

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF TEXAS
3 HOUSTON DIVISION

4 CASEY NELSON, ET AL * 4:17-CV-02171
5 V. *
6 TEXAS SUGARS, INC., ET * 8:59 A.M. to 4:09 P.M.
AL * JUNE 19, 2019

7 TRIAL EXCERPT - JURY CHARGE, CLOSING STATEMENTS,
8 AND JURY INSTRUCTIONS
9 BEFORE THE HONORABLE ALFRED H. BENNETT
AND A JURY
Volume 1 of 1 Volume

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VOLUME 1
(Excerpt of Trial - Jury Charge, Closing and Jury Instructions)

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Hearing

1 (Beginning of requested excerpts, as follows:)

2 (Open court, parties present, no jury.)

3 THE COURT: Good morning. Thank you. Please
4 have a seat. Cause Number 4:17-CV-2171, Casey Nelson, et
5 al v. Texas Sugars, Inc.

08:59:49

6 Counsel, please announce your appearances for the
7 record.

8 MR. COOK: Kelly Cook for the plaintiffs.

9 MR. BERLANGA: Warren Berlanga for the

08:59:54

10 Plaintiffs.

11 MR. KING: Will King for the defendant.

12 MR. WALLACE: Casey Wallace for the defendant,
13 Your Honor.

14 THE COURT: Very well. Let the record reflect
15 counsel for the parties are present, the jury is not
16 present in the courtroom.

09:00:01

17 Overnight the Court had requested that the parties
18 provide the Court with additional guidance on the issue as
19 to whether or not plaintiffs have met their burden of just
20 basic evidence of a prima facie case as to the number of
21 hours worked. Of course, as the plaintiffs have pointed
22 out, that once they were -- they reached that point, the
23 burden shifts to the defense. But the question that the
24 Court has is have they met their initial burden of
25 evidence.

09:00:24

09:00:48

Hearing

1 The Court in its memory in listening to the plaintiffs
2 cannot recall -- and I'm going to give plaintiffs the
3 opportunity to point this out to the Court -- cannot
4 recall where any plaintiff testified as to the number of
5 hours she worked in a given week, in a given month.

09:01:08

6 I do recall specifically where they talked about the
7 shifts that they worked. That each of the plaintiffs, I
8 believe, described what the Court now calls the morning
9 shift, the mid shift, and the night shift. And then each
10 plaintiff would testify I would work the mid shift during
11 the week or I would work the night shift. I did not hear
12 a specific number of hours ever mentioned for a specific
13 week for a specific plaintiff.

09:01:35

14 So the question is: By referring to working a
15 specific shift, does that raise a just and reasonable
16 inference as to the amount of hours worked that can now be
17 used and calculated by the jury to create a damage profile
18 for each plaintiff?

09:02:01

19 The plaintiffs overnight provided the Court with a few
20 cases. One of the cases that the Court -- that the
21 plaintiffs provided to the Court, *Mohammadi*, which is 990
22 F. Supp -- F. Supp. 2d, 723. In that case, which the
23 plaintiffs cite for their position that sufficient
24 evidence had been provided, even in that case there was,
25 in the opinion itself, a calculation where it was -- there

09:02:34

09:03:03

Hearing

1 was a breakdown per week or periods where there were hours
2 worked.

09:03:38

3 The Court cannot recall demonstrative evidence or
4 actual evidence that has been admitted taking away the
5 evidence that the Court has discussed. There has not been
6 a demonstrative piece of evidence or actually admitted
7 evidence where the plaintiffs wrote down the number of
8 hours per week, per month for any plaintiff.

09:04:00

9 So what I am going to do is I'm going to inquire as to
10 plaintiffs' counsel, and I'm going to go through these
11 individually so that you can point this out to me because,
12 ultimately, the question that the jury would have to
13 answer is, as to the minimum wage claim, what are the
14 number of hours worked times \$7.25 that should be
15 calculated for each plaintiff. And I want to know how
16 this jury is going to get to one side of that equation,
17 number of hours worked, based upon the testimony that I
18 have before this Court.

09:04:24

09:04:44

19 So, Counsel, understanding what I have said -- and if
20 I have misstated something, I won't be offended if you
21 tell me I have done so. You can point that out to me.
22 But as to Casey Nelson, what evidence is before this jury
23 as to the number of hours worked? And I believe, Counsel,
24 you also have the transcripts that were -- a rough draft
25 of the transcripts that were provided to you, and the

09:05:04

Hearing

1 Court has done a review of that, those transcripts, trying
2 to look for hours such that the jury's memory as to the
3 testimony would be -- I would -- assuming it's full and
4 complete, what is in the transcript as to how they would
5 make this calculation.

09:05:28

6 So let's start with Casey Nelson.

7 MR. COOK: You want me to take it. Okay.

8 Your Honor, with regard to Casey Nelson, in the record
9 at Pages 45, 66, and 89, she establishes the time -- the
10 dates that she worked. She testified that her dancing
11 schedule was Tuesdays, Wednesdays, Thursdays, Fridays.

09:05:46

12 THE COURT: Hold it. I'm sorry. You are going a
13 little bit too fast. It was what now?

14 MR. COOK: She testified that the dancing
15 schedule was Tuesday through Friday and every other
16 Saturday and that the average hours in her shift were six
17 to ten. Taking the most conservative estimate, we would
18 multiply by four and a half -- that would cover that every
19 other Saturday shift -- times six hours in a shift times
20 the minimum wage is \$195.75.

09:05:59

09:06:21

21 THE COURT: Walk me through that again as to
22 Casey Nelson.

23 MR. COOK: Sure. As to Casey Nelson, she
24 testified that she worked --

09:06:36

25 THE COURT: Hold on. I want to make sure I -- I

1 have failed to pull up the transcript.

2 MR. COOK: And I will pull mine up as well, Your
3 Honor.

09:07:42

4 THE COURT: What was the page number you referred
5 me to, Counsel?

6 MR. COOK: For example, on page -- so we get the
7 dates of her employment on Page 45.

09:08:08

8 THE COURT: Let me go back. I went too far. And
9 this is a rough draft. So we may be off on the page

10 numbers. So let me -- 45? You said Page 45? And I --

11 MR. COOK: And I think the clearest with regard
12 to hours --

09:08:35

13 THE COURT: Yeah. I think my page -- I'm looking
14 at the -- let me see which draft this is. We may have
15 different -- Rough 1, which go to Page 1.

16 MR. COOK: Yes. This is the PM session with
17 Judge Bennett presiding.

18 THE COURT: Okay.

19 MR. COOK: That's my first page of Rough 1.

09:08:46

20 THE COURT: Yes.

21 MR. COOK: On page -- I'm going to jump around.
22 On Page 80 --

09:08:55

23 THE COURT: Oh, no. I'm looking at the first
24 line is, "This is the 18th day of June, 2019. Good
25 morning. Please have a seat."

Hearing

1 MR. COOK: You have the voir dire, which we did
2 not request.

3 THE COURT: Okay. Hold on. Let me go back.

09:09:07

4 MR. COOK: If you do it by timestamp, Your Honor,
5 my Page 1 is 1:56:36.

6 THE COURT: Okay. Hold on. Yes. Okay. Now, PM
7 session, what page?

8 MR. COOK: Page 89, Your Honor, she testifies --

09:09:45

9 THE COURT: 89. Hold on. Okay. Page 88, 89 --
10 yes, sir.

11 MR. COOK: "QUESTION: And I believe you
12 testified earlier that when you had a shift at Moments, it
13 was how long?

09:09:53

14 "ANSWER: Shifts depend on when you show up. So your
15 time may vary.

16 "QUESTION: More than six hours?

17 "ANSWER: About six to ten."

18 THE COURT: All right. So the rough estimate is
19 the six to ten that you have told me. All right.

09:10:02

20 MR. COOK: I'm looking for the cite with regard
21 to her schedule. I apologize, Your Honor. This is
22 probably the one that I don't have a note for her on her
23 -- a page and line for the dates that she worked. I do
24 believe that I have it for the others.

09:10:31

25 MR. BERLANGA: I can search it.

1 MR. COOK: If you could do that.

2 If you would bear with us just for one moment, Your
3 Honor. And then on Page 49, Your Honor.

4 THE COURT: Hold on. We have hours, six to ten.

09:11:09

5 And on Page 49, you say?

6 MR. COOK: Yes. Timestamp 2:58:37, question.

7 THE COURT: Hold on. Let me get there. Page 49.

8 Yes, sir.

9 MR. COOK: "I want to talk about sort of -- we

09:11:25

10 talked about the actual shifts, the actual hours. I'm
11 going to talk about what your typical schedule was like.
12 I know it varied. Typically, what days of the week did
13 you work?

14 "ANSWER: Normal was five to six days. I never worked
15 a Sunday.

09:11:36

16 "QUESTION: So five to six days was as pretty much --"
17 Do I need -- for the record, would you like me to read
18 it?

19 THE COURT: No. Just point me to it.

09:11:47

20 MR. COOK: I certainly don't want it to appear as
21 though I'm suggesting the Court can't read the transcript.

22 THE COURT: No. You are guiding me, and I
23 appreciate that. So I see five or six days. So now we
24 have days of five to six.

09:12:01

25 MR. COOK: So we have days. We have hours.

Hearing

1 Minimum wage is not in controversy.

2 THE COURT: How many days such that we can
3 calculate hours, a total number of hours? Where is that
4 testimony? So if she worked six days and she worked ten
5 hours, 60 hours --

09:12:25

6 MR. COOK: Right.

7 THE COURT: -- or if she worked five days,
8 66 hours, is that the total amount that you are going to
9 submit to this jury? One week?

09:12:37

10 MR. COOK: Your Honor, this actually gets us into
11 the issue with the charge. Your Honor, the case law is
12 fairly -- we believe fairly clear that the calculation of
13 the actual number, what amount of money, is done by the
14 Court after the fact. And one of the reasons for that,
15 which is why this would otherwise be a fairly difficult
16 charge to craft, the statute of limitations varies
17 depending on the jury's finding on willfulness.

09:12:53

18 THE COURT: Right. But you are just -- you are
19 just pointing out to the Court now a one-week snapshot.
20 Is that it?

09:13:08

21 MR. COOK: In order to -- yes.

22 THE COURT: Okay.

23 MR. COOK: But I am going to also say that the
24 jury can then take that one week and that what we propose
25 is the jury would say in one week we find -- maybe we find

09:13:18

Hearing

1 30 hours. Maybe we find 60. And then the Court, after
2 hearing the willfulness answer and the statute of
3 limitations period, gets to the number, the actual number.

09:13:35

4 THE COURT: As to the total number of weeks
5 worked?

6 MR. COOK: Exactly.

7 THE COURT: Okay. That's Casey Nelson's
8 evidence. Maylene Velasco.

09:13:52

9 MR. COOK: On page -- I think this is -- we're
10 begging the Court's indulgence. Can we take them in the
11 order we did them? I think it will keep us on the same
12 transcript. We're going to have to switch transcripts, I
13 believe.

14 THE COURT: Okay.

09:14:05

15 MR. COOK: The next witness was Veronica
16 Gonzalez.

17 THE COURT: Yes.

18 MR. COOK: If you look at the same rough draft,
19 and I have Page 108.

09:14:18

20 THE COURT: 108. Hold on. I'm on 108, and this
21 is Ms. Gonzalez.

22 MR. COOK: Yes. Actually, the question is on
23 107. So we have sort of covered the time period you
24 worked at Moments and then the answer, which is relevant,
25 I worked it was usually either Tuesday through Friday,

09:14:39

Hearing

1 12:00 to 7:00, the same schedule, just Saturday every
2 other weekend. So, again, we have the number of days --

3 THE COURT: Hold on. Tuesday through Friday,
4 seven hours every other Saturday. So 28 hours during the
09:15:19 5 week, basically, plus an additional 14 hours, call it
6 three and a half, for a total of 31 and a half. Very
7 well.

8 MR. COOK: With regard to Kristal Garcia, we're
9 going to move to Rough 2, I believe.

09:16:02 10 (Sotto voce discussion between the Court and clerk.)

11 THE COURT: All right, Counsel.

12 MR. COOK: All right. On Page 72, time-stamped
13 10:05.

14 THE COURT: What page? I'm sorry.

09:16:37 15 MR. COOK: Page 72.

16 THE COURT: Yes.

17 MR. COOK: "And now I want to talk to you about
18 the typical hours you worked.

19 "ANSWER: I would work very often. I would work up to
09:16:52 20 five or six days a week.

21 "QUESTION: Can you tell the jury what your typical
22 day was?

23 "ANSWER: I typically -- nearly every day of the week
24 except Monday and maybe towards the end of the week I
09:17:00 25 would work five days instead of six."

Hearing

1 So we have five to six days per week.

2 THE COURT: Where are the hours?

3 MR. COOK: On Page 74.

4 THE COURT: So five to six days. You said

09:17:20 5 Page 74. I am on Page 74.

6 MR. COOK: "QUESTION: When you were working a
7 regular shift, how many hours would that be typically?

8 "ANSWER: Based on the amount of money you make, based
9 on the employees you pay, it could be anywhere from eight
10 to ten hours, depending on what you make and your bills,
11 et cetera."

09:17:34 12 And she also testified to working doubles but -- so
13 the jury could conclude more, but there is the minimum.

14 THE COURT: Very well. That's Garcia.

09:18:08 15 MR. COOK: With regard to Ms. Presley Lange.

16 THE COURT: Ms. Lange.

17 MR. COOK: Page 106.

18 THE COURT: The same transcript?

19 MR. COOK: Yes, Your Honor. This is why we did
09:18:18 20 them in this order.

21 THE COURT: 106. Yes, sir.

22 MR. COOK: "QUESTION: I want to talk" -- the
23 first question on that page.

24 "ANSWER: Three to five days, mainly three or four
09:18:43 25 days of the week. I do double shifts, which is from 12:00

Hearing

1 to 2:00."

2 THE COURT: Okay. So a minimum of three days.

3 MR. COOK: Then we got --

4 THE COURT: 12 hours. The same. I see it.

09:19:04

5 MR. COOK: Well, I am also going to direct you,
6 Your Honor, to Page 114.

7 THE COURT: 114.

8 MR. COOK: At timestamp --

9 THE COURT: Hold on.

09:19:16

10 MR. COOK: I apologize to the Court.

11 THE COURT: 114?

12 MR. COOK: Yes, Your Honor.

13 THE COURT: I apologize. This is the disconnect.
14 It's kind of like we are in two different time zones.

09:19:30

15 Okay. 114.

16 MR. COOK: At timestamp 11:08. "I want to jump
17 back just a little bit and maybe ask you a question I
18 forgot to ask you on the initial go-around. Can you give
19 me the average number of hours you worked per day?

09:19:42

20 "Per day sometimes it could be anywhere from eight
21 hours. We are going into from 12:00 to 2:00."

22 12:00 to 2:00 being the time.

23 MR. KING: I'm sorry. I missed the page.

24 MR. COOK: That would be on Page 114, timestamp

09:19:56

25 11:08.

Hearing

1 THE COURT: Some days working eight hours going
2 into 12. Okay. Now she reduces it to eight because she
3 said it was a double. So let's go --

09:20:15

4 MR. COOK: Some days she worked doubles. Some
5 days she didn't.

6 THE COURT: Right. That reduces it to 24.
7 24 hours. Got it. Next.

8 MR. COOK: With regard to Maylene Velasco, on
9 Page 129.

09:20:34

10 THE COURT: Hold on. Velasco, 129. The same
11 transcript?

12 MR. COOK: Yes, Your Honor. I'm sorry.
13 Page 129.

14 THE COURT: Yes. 129. All right. I am there.

09:21:15

15 MR. COOK: "QUESTION: Now, when you started work
16 a Moments, just tell me what kind of shift did you work?

17 "ANSWER: When I first started at Moments, I would
18 have to be there by 6:30 to start the 7:00 shift and I'd
19 usually stay till close.

09:21:28

20 "QUESTION: On average, how many days a week do you
21 think you worked?

22 "ANSWER: I did say more -- more how many days I
23 didn't work in the month. I didn't work around two out of
24 the month."

09:21:38

25 So from not working two days out of the month, you can

Hearing

1 draw the conclusion that she was working six to seven days
2 a week.

3 THE COURT: We'll call this seven hours.

09:22:07

4 MR. COOK: In full disclosure, Your Honor, I'm
5 not going to ask for that many days in a week, in light of
6 the testimony that was elicited.

7 THE COURT: Okay. We'll call it 35 hours?

09:22:28

8 MR. COOK: I'm going to ask for 40, Your Honor.
9 The hours information is on Page 132. So in terms of the
10 number of days --

11 THE COURT: I misunderstood you. So for hours
12 you are going to say seven?

13 MR. COOK: With regard to the number of the days
14 in the week --

09:22:41

15 THE COURT: No. I'm asking hours now.

16 MR. COOK: I'm going to ask for eight. And the
17 testimony establishes that it was up to 10 to 11. I think
18 that the jury may have some questions about her.

09:22:58

19 THE COURT: Well, she arrives at, let's call it,
20 7:00 and works until 2:00.

21 MR. COOK: Yes, Your Honor. On Page 132 she
22 states --

23 THE COURT: There is something else?

24 MR. COOK: Yes.

09:23:07

25 THE COURT: Hold on then. Yes. 132.

Hearing

1 MR. COOK: On Page 132 she states, "Can you give
2 the jury an idea of the average numbers worked, hours that
3 you would work in a single shift?

09:23:34

4 "If I started at 3:00 p.m. for my mid shift, I would
5 work until 2:00 a.m. So 10- or 11-hour shifts."

6 However, there was -- I don't have the note on this.
7 But there was some cross that suggested --

09:23:48

8 THE COURT: She said if I worked a mid shift.
9 That was not her usual time because earlier in the
10 testimony it was that she would usually arrive around 6:30
11 for a 7:00 shift.

12 MR. COOK: That is correct, Your Honor.

13 THE COURT: Okay.

09:23:58

14 MR. COOK: There is some subsequent cross that
15 suggests that she was working eight to six hours, which is
16 why I believe that I'm only going to ask the jury for
17 eight when I do the calculations.

09:24:12

18 THE COURT: Well, I got -- I have, just on what I
19 have seen, seven. I mean, that's from 7:00 to 2:00, if
20 I'm not mistaken, based upon the testimony that she said
21 she did work as opposed to if I worked.

22 MR. COOK: I understand, Your Honor.

09:24:33

23 THE COURT: Is that correct? The testimony was
24 that for my 7:00 shift I would arrive at 6:30 and stay
25 until 2:00. So that's a 7:00 to 2:00 shift.

Hearing

1 MR. COOK: That does add up to seven hours, Your
2 Honor. Let me look at --

3 THE COURT: And you said five days?

4 MR. COOK: That is correct, Your Honor.

09:24:55

5 THE COURT: I was a political science major, but
6 five times seven is 35.

7 MR. COOK: I tell people I went into law so I
8 wouldn't have to do math.

9 THE COURT: Okay.

09:25:05

10 MR. COOK: Actually, I tell people I went into
11 law because I'm incompetent to do anything else.

12 THE COURT: Okay. All right. That's Velasco.

13 MR. COOK: That's the last of the plaintiffs.

14 THE COURT: That's the last one?

09:25:14

15 MR. COOK: That is, I believe. We should have
16 five.

17 THE COURT: Let's see. Nelson and Gonzalez and
18 Garcia and Lange and Velasco. All right. Now, assuming
19 that this is the formula, the next question then becomes
20 does accepting this testimony that you have pointed out to
21 the Court at face value, which has been unsubstantiated by
22 anything else, other than their sworn testimony, am I
23 correct in that?

09:25:42

24 MR. COOK: You are not correct in that.

09:25:56

25 THE COURT: Okay. Tell me where I --

Hearing

1 MR. COOK: I love telling a federal judge that.

2 I asked the corporate representative if various
3 numbers of hours per week were reasonable based on both
4 the testimony -- the hours presented by the declarants and
5 by the plaintiffs. He said 56 hours a week.

09:26:12

6 THE COURT: No. No. I remember that testimony.
7 And what you asked him was whether or not those were
8 reasonable. The question was not as to -- for instance,
9 as to plaintiff Casey, she has testified that she worked
10 Tuesday through Friday, a six- to ten-hour shift. Do you
11 take any exception to that? That was not the line of
12 questioning.

09:26:31

13 I think your line of questioning in general was as to
14 the total number of, you know, would a 40-hour workweek be
15 reasonable? Yeah. 50. 60. It wasn't in regard to any
16 specific plaintiff's testimony. Am I correct?

09:26:51

17 MR. COOK: That is correct because the corporate
18 representative had previously testified that he has no
19 knowledge of these particular plaintiffs' hours.

09:27:07

20 THE COURT: So again, as to their testimony as to
21 their hours of work, their hours worked, it was not
22 substantiated by anything other than their own testimony,
23 correct?

24 MR. COOK: And I would argue that the testimony
25 of the corporate representative is circumstantial, but no

09:27:25

1 direct evidence. I agree with that, Your Honor.

2 THE COURT: All right.

3 MR. COOK: And I would also argue that the fact
4 that they all say similar hours per week is also
5 circumstantial evidence.

09:27:37

6 THE COURT: Okay. Anything else you would like
7 to point out to the Court?

8 MR. COOK: By way of facts or argument?

9 THE COURT: Facts or argument.

09:28:16

10 MR. COOK: With regard to argument, Your Honor, I
11 would point out that the cases primarily cited by the
12 defense on the subject of one witness can't get you there
13 are generally in the context of off-the-clock work cases
14 where there is some time sheet that a plaintiff has
15 prepared saying I worked eight hours and comes in after
16 the fact and says no, no, no. I didn't work eight hours.
17 I actually worked ten. And that is insufficient.

09:28:33

18 But the Fifth Circuit, this district court -- or not
19 this specific district court, but the Southern District of
20 Texas has said you don't have to produce documentary
21 evidence. We don't have to produce exact evidence. We
22 can rely on the plaintiff. We have met the threshold.

09:28:48

23 The alternative is defendants, like the defendant
24 here, who don't keep records, who have workers who, you
25 know, they go by fake names at the club. So they don't

09:29:09

Hearing

1 really know each other. They are not able to come in and
2 testify about each other. Then that ends up a situation
3 where, I believe, there is no dispute that these women
4 worked something. We simply have difficulty pinning it
09:29:29 5 down to an exact number. And the case law says we don't
6 have to.

7 THE COURT: Very well. Thank you, Counselor.
8 Counselor.

9 MR. KING: Good morning.

09:29:37 10 THE COURT: Good morning.

11 MR. KING: The case law on this is relatively
12 sparse; but one thing that I've found is that courts do
13 recognize when testimony, whether it's presented in court
14 through a witness or corroborating witnesses, cannot be
09:29:50 15 conclusory. And that is what the jury heard during this
16 trial was conclusory testimony about how many shifts might
17 have been worked, generally speaking.

18 In the aggregate, the testimony sounded like this: I
19 worked a lot of shifts. And then that was it. There was
09:30:09 20 no -- there wasn't sufficiently specific testimony to
21 afford the jury with a basis to actually do the math.
22 Saying I simply worked every day, every week for three
23 years is effectively what we had. A lot of the testimony
24 that has been cited here today was talking about, well,
09:30:29 25 what kind of shifts does Moments have. That's not the

Hearing

1 same as saying I happened to work the mid shift at least
2 three times a week and that was three times a month in my
3 last year of employment there. That would be a way to do
4 it.

09:30:45

5 The second issue is that there was a lot of
6 contradictory testimony from the witnesses themselves.
7 For example, in -- I believe this was Ms. Lange's
8 testimony. This is the second rough draft, Page 114. And
9 the question was -- and I'll paraphrase -- "Can you give
10 us an average number of hours you worked per day?

09:31:12

11 "Per day sometimes it could be anywhere from eight
12 hours or going into from 12:00 to 2:00.

13 "How many hours did you work on the average week?

09:31:24

14 "On the average weekend, I don't know. I'm not good
15 at math. I can't tally it up like that. It really
16 depended on how much money I made if I was going to keep
17 working or not."

09:31:37

18 If the witness herself has not bothered to tally it up
19 and hasn't expressed how to tally it up to the jury, the
20 jury is going to be at a complete loss as to how to, you
21 know, do the calculation.

09:31:55

22 The second issue is I do have concerns about this
23 entire topic from the perspective that damages -- there is
24 an issue with compensable work time that has been
25 performed within the club. I didn't hear any testimony

Hearing

1 from any of the witnesses that they worked every hour
2 within the club. Just because you are at a place does not
3 mean that it's a compensable hour under from the Fair
4 Labor Standards Act.

09:32:11

5 Secondarily, I think that there are workweek issues as
6 well because the workweek is defined as 168, basically,
7 consecutive hours. These witnesses testified that, yeah,
8 maybe -- yeah, some of the times I kind of showed up but
9 most of the time I showed up every day.

09:32:29

10 Well, most of the time is not a sufficient basis, and
11 that's what these cases really show. The cases that the
12 plaintiffs pointed out to the Court --

09:32:44

13 THE COURT: Ms. Edwards, our jury has arrived.
14 Would you tell them that the Court is dealing with legal
15 issues and it will probably -- as a matter of fact, they
16 can go on a coffee break, stretch their legs, until 10:30.

17 CASE MANAGER: Yes, sir.

18 MR. KING: Your Honor, may I proceed?

19 THE COURT: Yes.

09:33:04

20 MR. KING: The testimony has been
21 unsubstantiated. That is a critical issue. I heard what
22 counsel said about the federal nature of a lot of dancers,
23 and I understand that. But I don't believe that that is
24 entirely true. I'll give the Court an example.

09:33:19

25 When I was deposing Ms. Nelson, her sister was there.

Hearing

1 Her sister happens to be an entertainer who worked at
2 Moments around the same time. They know each other.

3 In this case, video was produced of somebody walking
4 into our client's club trying to get testimony from --
09:33:35 5 trying to get a deejay on the record or somebody on the
6 record talking about the rules and regulations, and there
7 are three people talking about the club.

8 So it is not fair or accurate to state that it's
9 impossible to corroborate this evidence. The way that
09:33:51 10 this testimony could have been presented is: I want you
11 to look through your calendars. I want you to look
12 through your cell phones. I want you to look through your
13 e-mails. I want extrinsic proof of where you were and
14 what you were doing over those past couple of years. Talk
09:34:06 15 to your friends, talk to your family, figure it out.

16 Those are the additional things that are needed. The
17 defendant's position is not that you have to have a
18 written record of it, but they do not produce sufficient
19 evidence to shift the burden back, Your Honor.

09:34:22 20 THE COURT: Very well.

21 MR. WALLACE: Your Honor, may I add one thing?

22 THE COURT: Yes.

23 MR. WALLACE: There is an issue of just
24 fundamental fairness. Each one of these plaintiffs
09:34:36 25 answered Interrogatory Number 16. We had those as

Hearing

1 proposed exhibits. We didn't enter them because they
2 didn't put on any evidence about their damages because it
3 was contradicted by their interrogatory answers.

4 Interrogatory 16, every single one of these five were
09:34:51 5 asked, quote, "State the amount of damages each plaintiff
6 and opt-in plaintiff is claiming to be owed from
7 defendants and explain in detail the calculation of the
8 damages sought."

9 THE COURT: Well, the problem, Mr. Wallace, is
09:35:04 10 that that is not before me right now.

11 MR. WALLACE: No. I know that, Judge. I know
12 that. But the answer, each time, was plaintiff does not
13 know the amount of damages. Every -- those were sworn
14 answers.

09:35:19 15 Now I agree that's not before the jury, and I agree
16 those answers aren't before you as evidentiary elements to
17 the case. But we didn't -- we had no -- because they
18 didn't testify about the method and means by which they
19 came up with their damages, we didn't introduce this
09:35:41 20 for -- you know, there was no reason to contradict their
21 testimony because they didn't have any. And it's just a
22 matter of fundamental fairness when we rely on
23 interrogatory answers that they didn't know how they came
24 up with their damages because they didn't know what they
09:35:56 25 are.

1 THE COURT: Well, without going into your
2 decision to challenge them with interrogatory answers or
3 not, what I have before me is the evidence. You made a
4 directed verdict motion at the close of plaintiffs' case
5 in chief, and that decision -- my decision is triggered on
6 what evidence is before me and before this jury for
7 purposes of making that decision.

8 Very well. All right. Thank you, Counsel. We'll be
9 back.

10 (Recess from 9:37 a.m. to 11:34 a.m.)

11 THE COURT: Thank you. Please be seated. We are
12 back in the courtroom on the record. My apologies for the
13 lateness. What the Court has decided to do on the
14 directed verdict motion, the motion -- defendant's
15 directed verdict motion is denied.

16 However, to the extent that additional briefing is
17 required, the Court will take up the issue post verdict,
18 if any, from this jury. So I'm not foreclosing revisiting
19 the issue.

20 But given the fact that we have a jury in the box,
21 this is one of those judicial economies to where if I
22 grant the directed verdict and I am wrong, we're going to
23 come back and retry this case. To the extent that we get
24 a verdict and I am -- I decide either way, at least we
25 have a verdict in place that the court of appeals can look

1 at and either vacate or affirm. And so I think this is
2 the safer play in how to address the issue.

3 What the Court has done at this point is redrafted,
4 and that's what took so long. The proposed jury
11:36:07 5 instructions from the parties did not meet the
6 requirements that I determined were necessary. And so
7 the -- through the first several pages of just the
8 basic -- all this is pattern jury charge, basically.

9 Jury Question Number 1 I think is pretty
11:36:43 10 straightforward. I don't think anyone would have any
11 objection, but I'll give you a chance to object to that.

12 Jury Question Number 2 is another standard question.

13 Jury Question Number 3 is standard. The only question
14 here will be the time period, and I'll hear you on that.

11:37:02 15 And then Jury Question Number 4, this is the question
16 that the Court has struggled with. And so the formula
17 that the Court has determined would be the total number of
18 hours worked times the \$7.25. And so we'll see if, in
19 fact, the jury can come to an answer based on that formula
11:37:23 20 because that's the damage profile that is being sought
21 here. And the question will be whether or not they will
22 be able to answer that question then. We'll see.

23 Finally, Jury Question Number 5, that goes to the
24 question of the overtime cause of action.

11:37:46 25 And then, of course, the final instruction is pretty

1 straightforward.

2 I know I have just handed this to you. Any questions,
3 comments, and then we'll start a formal charge conference
4 in a moment.

11:37:59 5 MR. KING: No questions right now, Your Honor.

6 THE COURT: All right.

7 MR. COOK: I don't think I have anything
8 informally.

9 THE COURT: Okay. On Question Numbers 4 and 5 --

11:38:37 10 MR. COOK: Judge, I do have one question
11 informally, Your Honor.

12 (Sotto voce discussion between the Court and Clerk.)

13 THE COURT: You had a question, Counsel?

14 MR. COOK: I did, Your Honor. Just for my
11:39:23 15 purposes, instead of trying to parse it very closely, did
16 the Court make any changes to the pattern jury instruction
17 on employee/independent contractor? It doesn't appear to
18 be.

19 THE COURT: Yeah. I doubt it.

11:39:35 20 MR. COOK: No. Okay.

21 THE COURT: How long do you anticipate this is --
22 I'm going to send a message back to the jury. How long do
23 you anticipate needing for closing?

24 MR. COOK: Your Honor, plaintiff would ask for
11:40:18 25 20 minutes in opening close and five minutes in rebuttal.

1 THE COURT: Repeat that.

2 MR. COOK: 20 minutes to start and five in
3 rebuttal.

4 THE COURT: So a total of 25?

11:40:29

5 MR. COOK: Yes, Your Honor.

6 MR. WALLACE: I think I can do it in 25, Judge.
7 I might stretch it to 26. I'll do my best to do 25.

8 THE COURT: No violence is done at 30 minutes
9 apiece.

11:40:44

10 MR. WALLACE: Thank you.

11 THE COURT: Let me go back.

12 MR. COOK: I apologize if this is in your
13 procedures and I omitted it. Do I need to declare how
14 much of the 30 I need for rebuttal ahead of time?

11:41:02

15 THE COURT: Yes. You'll be timed. For instance,
16 if you say 20/10 and you go 20, I'll give you your 20 is
17 expired and you can even still take two of the ten if you
18 want but it's a total of 30.

19 MR. COOK: Very good. Thank you, Your Honor.

11:41:24

20 THE COURT: Okay. Any additional questions or
21 comments?

22 MR. WALLACE: On the charge itself?

23 THE COURT: Yeah. Informally before -- this is
24 not the formal. I will get it on the record but before we
25 do that --

11:41:34

1 MR. WALLACE: Informally, Your Honor, just a
2 global -- just a global comment. And I'm looking at Jury
3 Question Number 1, for example.

4 THE COURT: Yes.

11:41:48

5 MR. WALLACE: You say has plaintiff proved that
6 she was an employee.

7 THE COURT: Oh, plurals.

11:41:59

8 MR. WALLACE: I think if you do the universal
9 thing throughout, it would be have plaintiffs proved that
10 they were, and that's a consistent issue throughout the
11 charge.

12 THE COURT: Okay.

11:42:09

13 MR. COOK: My comment, if I could. I think given
14 that we're asking about each plaintiff individually,
15 probably the correct fix would be has each plaintiff
16 proved, answer yes or no for each plaintiff.

17 MR. WALLACE: Well, that's fine. It is just my
18 only issue is the plurality of it.

19 MR. COOK: Right.

11:42:25

20 THE COURT: So has each one. Yes. We'll put
21 "each" on Juror Question Numbers 1 and 2 and 4 and 5; is
22 that right?

23 So it will be, for one, has each plaintiff proved that
24 she was an employee. Number 2, has each plaintiff proved.

11:43:17

25 Three is fine. Jury Question Number 4, what sum of money

1 would fairly and reasonably compensate each plaintiff for
2 the damages, if any, you have found defendant Texas Sugars
3 caused each plaintiff. Only calculate sums for the
4 plaintiffs for whom you have answered. That's fine.

11:43:41

5 Five, "each" before plaintiff. Does that work?

6 MR. COOK: From the plaintiffs, yes.

7 MR. WALLACE: Yes, Your Honor.

8 THE COURT: All right. Ms. Edwards.

9 CASE MANAGER: Yes, sir.

11:43:56

10 THE COURT: Inform the jury -- 30 minutes, an
11 hour and a half -- that when they are called into the
12 courtroom, they are going to have an hour and a half of
13 work. So would they like to take their lunch now or would
14 they like to come into the courtroom in approximately
15 15 minutes, meaning that they would be done approximately
16 1:30, or they can go take a quick lunch now and come back
17 at 12:30 and get started at that time. See what their
18 preference is.

11:44:18

19 They could either do lunch now and come back at 12:30
20 or they can come into the courtroom at approximately 12:00
21 and they are not going to be released for lunch until
22 approximately 1:30.

11:44:39

23 CASE MANAGER: Okay.

24 THE COURT: Any other comments before we get on
25 the record for the formal charge conference?

11:44:53

1 MR. COOK: No, Your Honor.

2 MR. WALLACE: I can bring it up during the formal
3 charge conference.

11:45:09

4 THE COURT: Very well. This is Cause
5 Number 4:17-CV-2171. The Court at this time has prepared
6 the jury instructions. It has been provided to the
7 parties. They are represented by legal counsel here in
8 the courtroom. The jury is not present in the courtroom.

11:45:33

9 The Court at this time will entertain objections to
10 the charge on behalf of the plaintiff. Counsel.

11:45:49

11 MR. COOK: Your Honor, the plaintiffs, with
12 utmost respect, do object to the charge. In the first
13 instance, the plaintiffs object to the instruction
14 "employee or independent contractor." The charge as
15 proposed by the Court, in the view of the plaintiff,
16 misstates the controlling case law or rather misstates the
17 controlling law.

11:46:07

18 Specifically, Your Honor, it gives improper weight to
19 control by applying, essentially, a 7th Circuit -- excuse
20 me, a Title VII hybrid control economic realities test.
21 It improperly gives weight to intent, which is not an
22 appropriate factor or certainly not to the level that this
23 charge gives it in an FLSA case. The plaintiff has
24 previously provided a bench brief containing elaborations,
25 which we would incorporate by reference here.

11:46:30

1 We would also point out that the plaintiffs have
2 provided a recommended charge, a proposed charge, which is
3 Document Number 47 in the docket. Plaintiffs would point
4 out that even if the Court were not to give the proposed
5 instructions of the plaintiff that this charge does not
6 contain the *Silk* factors set forth by the United States
7 Supreme Court in determining independent verses --
8 independent contractor versus employee under the Fair
9 Labor Standards Act.

10 The plaintiffs would object to jury question --

11 THE COURT: Let me deal with your first objection
12 and make sure that I'm clear that in regards to the
13 instruction that you are objecting to under "employee or
14 independent contractor" on Page 10, you are objecting to
15 Factor 6, which is a direct quote from the pattern jury
16 charge; is that correct?

17 MR. COOK: Yes. I'm also objecting --

18 THE COURT: That objection is overruled as to
19 six. What was the next objection as to that instruction?

20 MR. COOK: We object to Paragraph 5 that is not
21 one of the *Silk* factors.

22 THE COURT: That, again, is from the pattern jury
23 charge, and your objection is overruled.

24 MR. COOK: We object to Section 4, which is not
25 from the *Silk* factors and, we believe, misstates the *Silk*

1 factors.

2 THE COURT: It's from the pattern jury charge.
3 Your objection is overruled.

11:48:09

4 MR. COOK: We object to Number 3, which
5 improperly examines only the plaintiffs' risk as opposed
6 to the weighing the investments of the parties, as
7 required by *Silk*.

8 THE COURT: Three, you said? I'm sorry.

11:48:28

9 MR. COOK: We're working backwards,
10 unfortunately, Your Honor. I apologize.

11 THE COURT: And again, Pattern Jury Charge 11.26,
12 your objection is overruled.

11:48:40

13 MR. COOK: We object to Element Number 2 or
14 Instruction Number 2 on this page. Again, it does not
15 comport with the *Silk* factors.

16 THE COURT: Pattern Jury Charge 11.26, your
17 objection is overruled.

11:48:55

18 MR. COOK: We object to the language in
19 Section 1, which we believe misstates the importance of
20 control. Again, it deviates from the case law *Silk*,
21 *Parrish*, and other cases cited by the plaintiffs in their
22 bench brief.

23 THE COURT: Pattern Jury Charge 11.26, your
24 objection is overruled.

11:49:12

25 MR. COOK: Your Honor, on the last sentence on

1 Page 10, while no single factor determined the outcome,
2 the extent of the right to control the means and manner of
3 the worker's performance is the most important factor.
4 The plaintiff believes that is an incorrect statement of
5 the law under the case law cited earlier.

11:49:28

6 THE COURT: Again, that is straight from the
7 Pattern Jury Charge 11.26. Your objection is overruled.

8 MR. COOK: Plaintiffs would offer their proposed
9 jury charge in place of this instruction.

11:49:45

10 THE COURT: The Court has received it. I will
11 sign it and note it. It has been rejected.

12 MR. COOK: Thank you, Your Honor. That
13 included --

14 (Sotto voce discussion between counsel.)

11:50:12

15 MR. COOK: The plaintiff objects to Jury Question
16 Number 1. The determining whether a person is an employee
17 or independent contractor is ultimately a question of law;
18 and we believe the Court should properly ask special
19 interrogatories and then make the decision based on those
20 interrogatories as a legal question. Therefore, we think
21 it is improper to ask the jury to decide employee status.

11:50:27

22 THE COURT: That is Pattern Jury Charge 11.26,
23 Question Number 1. Your objection is overruled.

24 MR. COOK: With regard to Jury Question Number 3
25 and specifically with regard to the instructions, if you

11:51:11

1 answered yes to Question Number 3 and setting out the time
2 periods, the plaintiff believes that that calculation is
3 properly done by the Court, based on special
4 interrogatories, and so, therefore, would object to Jury
5 Question Number 3 as part of the entire charge.

11:51:28

6 THE COURT: That objection is overruled.

7 MR. COOK: With regard to Jury Question Number 4,
8 the plaintiff objects and believes that the correct method
9 of calculating damages is to be done, one, by the Court
10 and the question that should be asked the jury is the
11 total number of hours -- or excuse me -- the average
12 number of hours worked in a week, to which the Court would
13 then apply the appropriate period of weeks, based on the
14 statute of limitations, and apply the appropriate damage
15 calculation.

11:51:54

11:52:07

16 THE COURT: That objection is overruled.

17 MR. COOK: The plaintiff would have the same
18 objections to Jury Question Number 5, that it should be
19 done by the Court applying the statute of limitations and
20 the damage calculation and that the question for the jury
21 should be the number -- the average number of hours worked
22 in a week.

11:52:20

23 THE COURT: That objection is overruled.

24 MR. COOK: Your Honor, we object that there is an
25 absence of a question. We have submitted proposed Jury

11:52:33

11:52:51

1 Question Number 3 the how many hours -- excuse me, Your
2 Honor -- proposed Jury Question Number 4, Document
3 Number 47, which would recapture the amount that the
4 dancers were required to pay, which does reduce their wage
5 below the minimum wage. We believe there is a need for a
6 jury question on that issue.

7 THE COURT: Objection is overruled.

8 MR. COOK: I don't think I can object about
9 anything else, Your Honor.

11:53:02

10 THE COURT: It would be hard to.

11 Very well. The Court at this time will now entertain
12 objections to the charge on behalf of the defense.

11:53:23

13 MR. WALLACE: Your Honor, we'll do this as best
14 as we can. Throughout, both Mr. King and I will have
15 comments, if that's okay. It will make -- I promise we'll
16 do this quickly. If we go to Page 6.

17 THE COURT: Yes.

11:53:40

18 MR. WALLACE: And this is just one example. I
19 think it continues throughout. It begins "plaintiff
20 claims;" and again, I just think we need it to be either
21 each plaintiff or plaintiffs.

22 THE COURT: We can make that correction.

23 MR. WALLACE: Thank you.

24 THE COURT: Each plaintiff claims, yes.

11:53:51

25 MR. WALLACE: And then in between Number 1 and

1 Number 2, I just think the word "and" should be added.

2 THE COURT: I will confirm that.

3 MR. WALLACE: Okay. On Page 7 it would be the
4 same thing whether "and" should be in between the
5 semicolon and the number two.

11:54:11

6 I'm sorry. I was waiting on you, Judge.

7 THE COURT: I'm checking on the "and." Okay. So
8 continue on with your objection.

9 MR. WALLACE: Jury Question Number 1.

11:55:07

10 THE COURT: Yes.

11 MR. WALLACE: At the end the Court provides "if
12 your answer is no to all plaintiffs, do not answer the
13 next question." We believe it should read answer no
14 further questions. The jury foreman shall execute the
15 verdict certificate and return the same to the court
16 officer.

11:55:20

17 THE COURT: That objection is overruled. The
18 following questions are predicated. So if you do not
19 answer Question 1, you do not answer Question 2. And
20 Question 3 is predicated on a positive answer to two. So
21 they wouldn't get to those following questions as a
22 result.

11:55:44

23 MR. WALLACE: Go ahead. You have got all yours.

24 MR. KING: Your Honor, the defendant has not
25 submitted a written instruction, but I do believe that a

11:56:13

1 definition of reckless disregard should be included, and I
2 can provide the Court with the proposed language of such
3 an instruction right now.

4 The language would read, in general, to show reckless
11:56:29 5 disregard of the FLSA, an employee must show that the
6 employer had some reason to know that its conduct violated
7 the FLSA beyond mere ignorance of the law. Mere knowledge
8 of the FLSA and its potential applicability does not
9 suffice nor does conduct that is merely negligent or
11:56:45 10 unreasonable. An employer who acts without a reasonable
11 basis for believing that it was complying with the FLSA or
12 who fails to seek legal advice regarding its payment
13 practices is merely negligent. This language is derived
14 from *Pye v. Oil States Energy Services, LLC*, 233 F. Supp
11:57:03 15 3d 541 out of the Western District of Texas, as well as
16 *Zannikos v. Oil Inspections*, 605 F. App. 349, Fifth
17 Circuit 2015.

18 THE COURT: That proposed instruction is denied.
19 The Court will check to see if there is a definition under
11:57:22 20 the pattern jury charges; and if so, it will include it.

21 MR. KING: Under Question 4, the defendant would
22 request that the word "workweek" is included within the
23 formula section to read "total number of hours worked per
24 workweek" because that term is defined in the instructions
11:57:57 25 and appears nowhere else in the jury interrogatories.

1 This could create confusion for the jury.

2 THE COURT: Where is that instruction or
3 definition? On what page?

4 MR. KING: Page 7, Your Honor.

11:58:26

5 THE COURT: Page 7. All right. The hours worked
6 is in the following definition, "The phrase 'hours worked'
7 includes all time spent by an employee that was primarily
8 for the benefit of the employee or the employer's
9 business." So when you say that's not defined, there is a
10 definition for that.

11:58:54

11 MR. KING: My understanding, Your Honor, is that
12 the phrase "hours worked" is usually translated into
13 compensable time, time actually spent for which a wage is
14 deserved.

11:59:10

15 THE COURT: I think that's what the definition
16 says. The phrase -- on Page 7, tell me if I'm missing
17 something, "The phrase 'hours worked' includes all time
18 spent by an employee that was primarily for the benefit of
19 the employer or the employer's business."

11:59:26

20 Am I missing something?

21 MR. KING: The only addition that we would ask
22 for is that that formula reads total number of hours
23 worked per workweek because that is a distinct unit of
24 measurement of time under the Fair Labor Standards Act.

11:59:48

25 THE COURT: Okay. That objection is overruled.

1 And I will point out that your proposed jury instruction
2 includes that exact language that you have just objected
3 to.

12:00:03

4 MR. KING: I understand, Your Honor. We have the
5 same objection regarding the formula on Question Number 5,
6 all hours worked over 40 in each workweek.

7 THE COURT: I think we can make that change to
8 say "workweek", "all hours worked over 40 in that
9 workweek."

12:00:28

10 MR. KING: The second modification that we would
11 request is the language of Question Number 5, "What sum of
12 money would fairly and reasonably compensate plaintiff for
13 overtime damages, if any?"

14 THE COURT: The Court will make that change.

12:01:19

15 MR. WALLACE: We don't have anything further,
16 Your Honor.

17 THE COURT: Very well.

18 (Sotto voce discussion between counsel.)

12:01:55

19 MR. COOK: Your Honor, I have one more. I
20 noticed something, if I may.

21 THE COURT: Yes.

12:02:07

22 MR. COOK: Extremely minor. Jury Question
23 Number 5, after listening to the defendants, it occurs to
24 me that the formula should say all hours worked over 40 in
25 a workweek because we are not submitting it based on how

1 many X number of weeks multiplied by. Since they are
2 getting all the damages, it should be all hours worked
3 over 40 in a workweek, given any workweek.

4 THE COURT: For that workweek.

12:02:25

5 MR. COOK: I'm just afraid that there will be
6 confusion and they will award the amount of overtime for
7 one workweek instead of over the history of the
8 employment.

9 THE COURT: In a workweek?

12:02:41

10 MR. COOK: In a workweek is what we would ask
11 for.

12 THE COURT: That's fine.

13 MR. COOK: I apologize for going out of order on
14 that, Your Honor.

12:02:52

15 THE COURT: Anything else?

16 MR. COOK: No, Your Honor.

17 THE COURT: All right. Why don't you make those
18 changes and then print out -- how many copies do you guys
19 need? One?

12:03:11

20 MR. KING: One would be fine.

21 MR. WALLACE: I would like two.

22 MR. COOK: Two, please.

23 THE COURT: The government printing expense is
24 going up. Print out two per side.

12:03:22

25 MR. COOK: We can live with one, Your Honor.

1 THE COURT: Ms. Edwards, let them know we're
2 making our final revisions.

3 CASE MANAGER: Yes, sir.

4 MR. COOK: So they've opted for a later lunch?

12:03:35

5 THE COURT: No. They want to go. They want to
6 go to the food trucks. On Wednesday they bring food
7 trucks down to City Hall. So people walk over to City
8 Hall and pick out whatever food they want from the trucks.

12:03:52

9 MR. COOK: I misunderstood. So we are going to
10 adjourn?

11 THE COURT: No. As soon as he makes the
12 corrections and brings them back, we're going to go.

13 MR. COOK: They are going to the later lunch is
14 the way I --

12:04:01

15 THE COURT: Yes.

16 MR. COOK: All right.

17 THE COURT: There was one point. There was an
18 individual that was a defendant in this case; is that
19 correct?

12:06:31

20 MR. COOK: At one time, Your Honor. The
21 defendants moved for summary judgment as to that
22 defendant's employer/employee status -- excuse me --
23 employer status, and I believe we did not oppose it and
24 maybe even non-suited.

12:06:42

25 THE COURT: Okay. I wanted to confirm.

1 MR. COOK: Procedurally, I don't recall, but she
2 is out of the case from the plaintiffs' perspective.

3 THE COURT: That's right. I wanted to confirm
4 that. The Court received no evidence. If she was not out
5 of the case through that method, I was going to, on the
6 Court's motion, grant a directed verdict as to the
7 individual defendant but it seems like there is an
8 agreement that individual is no longer in the case.

9 MR. KING: I believe it's in your summary
10 judgment order, Your Honor.

11 THE COURT: Okay.

12 MR. COOK: I don't recall.

13 THE COURT: I think in some of the jury charges
14 that were submitted you still had her in there.

15 MR. COOK: I think we didn't change the caption.

16 THE COURT: That was in one of the definitions.

17 MR. COOK: Oh, really?

18 THE COURT: Yes.

19 MR. COOK: Oh, my apologies. That should not
20 have been. There was no -- as I said, I don't believe we
21 even opposed summary judgment. I think that was agreed.

22 THE COURT: I think that threw me for a second.

23 (Recess from 12:07 p.m. to 12:20 p.m.)

24 THE COURT: Please have a seat. The corrections

25 that the Court noted during the charge conference have

1 been included. Any corrections that have not been made
2 subject to a -- or that were requested as a result of
3 objection are hereby overruled, but I included everything,
4 I believe.

12:21:00

5 Everyone has their copy. We are ready to proceed. So
6 on the math, 30 minutes.

7 MR. COOK: 20/10, Your Honor.

8 THE COURT: 20/10. Do you want a warning on your
9 five -- on your 20? I'm sorry.

12:21:18

10 MR. COOK: No. I'll take it when -- I should be
11 definitely wrapping up at 20. If I go over a minute or
12 two, as you said, I should be fine.

13 THE COURT: Okay. Do you want a warning on your
14 30?

12:21:29

15 MR. WALLACE: Please, Your Honor.

16 THE COURT: Where at?

17 MR. WALLACE: 25.

18 THE COURT: 25. So a five-minute warning.

19 Very well. Bring them in. All rise for the jury.

12:21:40

20 (Jury entered courtroom at 12:21 p.m.)

21 THE COURT: Thank you. Please be seated.

22 Good afternoon, ladies and gentlemen -- lady and
23 gentlemen of the jury.

24 First of all, I want to apologize for the delay in the
25 proceedings this morning. Strictly my fault. Not the

12:22:12

1 attorneys. We were preparing a very lengthy document and
2 we were going through some legal matters that I had to
3 sort through that I started last night and, with the
4 attorneys assistance, I had to work through this morning.

12:22:28

5 We actually started approximately 9:00 this morning and
6 have been working since. But again, that's on me. So
7 don't hold the delay this morning against the attorneys.

12:22:55

8 The Court has prepared the jury instructions. The
9 Court is now going to read the Court's jury instructions
10 to you. The original will be placed in the jury room,
11 once you retire to begin your deliberations. So you may
12 take notes as I read this. However, you will actually
13 have a written copy of what I'm about to read to you.

12:23:13

14 In the United States District Court for the Southern
15 District of Texas, Houston Division, Casey Nelson, et al
16 v. Texas Sugars, et al, Civil Action 4:17-CV-2171.

17 Members of the jury:

12:23:31

18 It is my duty and responsibility to instruct you on
19 the law you are to apply in this case. The law contained
20 in these instructions is the only law you may follow. It
21 is your duty to follow what I instruct you the law is,
22 regardless of any opinion that you may have as to what the
23 law ought to be.

12:23:46

24 If I have given you the impression during the trial
25 that I favor either party, you must disregard that

1 impression. If I have given you the impression during the
2 trial that I have an opinion about the facts of this case,
3 you must disregard that impression. You are the sole
4 judges of the facts of this case. Other than my
5 instructions to you on the law, you should disregard
6 anything I may have said or done during the trial in
7 arriving at your verdict.

12:24:01

8 You should consider all of the instructions about the
9 law as a whole and regard each instruction in light of the
10 others without isolating a particular statement or
11 paragraph.

12:24:15

12 The testimony of the witnesses and other exhibits
13 introduced by the parties constitute the evidence. The
14 statements of counsel are not evidence. They are only
15 arguments. It is important for you to distinguish between
16 the arguments of counsel and the evidence on which those
17 arguments rest. What the lawyers say or do is not
18 evidence. You may, however, consider their arguments in
19 light of the evidence that has been admitted and determine
20 whether the evidence admitted in this trial supports the
21 arguments. You must determine the facts from all the
22 testimony that you have heard and the other evidence
23 submitted. You are the judges of the facts, but in
24 finding those facts, you must apply the law as I instruct
25 you.

12:24:27

12:24:43

12:24:59

1 You are required by law to decide the case in a fair
2 and impartial, unbiased manner based entirely on the law
3 and on the evidence presented to you in this courtroom.

4 You may not be influenced by passion, prejudice or
12:25:12 5 sympathy you may have for the plaintiffs or defendant in
6 arriving at your verdict.

7 Your decisions will be based on whether a party has
8 met its burden of proof on any given issue. The burden of
9 proof is the minimum amount of evidence that is required
12:25:27 10 before you can rule in a party's favor.

11 To establish by a preponderance of the evidence means
12 to prove something is more likely so than not so. If you
13 find that a party has failed to prove any element of its
14 claim by a preponderance of the evidence, then it may not
12:25:42 15 recover on that claim.

16 The evidence you are to consider consists of the
17 testimony of the witnesses, the documents, and other
18 exhibits admitted into evidence and any fair inferences
19 and reasonable conclusions you can draw from the facts and
12:25:57 20 circumstances that have been proven.

21 Generally speaking, there are two types of evidence.
22 One is direct evidence, such as testimony of an
23 eyewitness. The other is indirect or circumstantial
24 evidence. Circumstantial evidence is evidence that proves
12:26:10 25 a fact from which you can logically conclude another fact

1 exists. As a general rule, the law makes no distinction
2 between direct and circumstantial evidence but simply
3 requires that you consider both in deciding whether or not
4 the burden of preponderance of the evidence has been met.

12:26:28 5 You alone are to determine the questions of
6 credibility or truthfulness of the witnesses. In weighing
7 the testimony of the witnesses, you may consider the
8 witness's manner and demeanor on the witness stand, any
9 feelings or interest in the case, or any prejudice or bias
12:26:43 10 about the case that he or she may have, and the
11 consistency or inconsistency of his or her testimony
12 considered in light of the circumstances. Has the witness
13 been contradicted by other credible evidence? Has he or
14 she made statements at other times and places contrary to
12:27:01 15 those made here on the witness stand? You must give the
16 testimony of each witness the credibility that you think
17 it deserves.

18 Even though a witness may be a party to the action and
19 therefore interested in its outcome, the testimony may be
12:27:17 20 accepted if it is not contradicted by direct evidence or
21 by any inference that may be drawn from the evidence, if
22 you believe the testimony.

23 You are not to decide this case by counting the number
24 of witnesses who have testified on the opposing sides.

12:27:30 25 Witness testimony is weighed. Witnesses are not counted.

1 The test is not the relative number of witnesses but the
2 relative convincing force of the evidence. The testimony
3 of a single witness is sufficient to prove any fact, even
4 if a greater number of witnesses testified to the
5 contrary, if after considering all of the other evidence
6 you believe that witness.

7 Impeachment by an inconsistent statement.

8 In determining the weight to give to the testimony of
9 a witness, consider whether there was evidence that at
10 some other time the witness said or did something or
11 failed to say or do something that was different from the
12 testimony given at the trial.

13 A simple mistake by a witness does not necessarily
14 mean that the witness did not tell the truth as he or she
15 remembers it. People may forget some things or remember
16 other things inaccurately. If a witness made a
17 misstatement, consider whether that misstatement was an
18 intentional falsehood or simply an innocent mistake. The
19 significance of that may depend on whether it has to do
20 with an important fact or with only an unimportant detail.

21 Fair Labor Standards Act minimum wage.

22 Each plaintiff claims that defendant Texas Sugars,
23 Inc. d/b/a Moments (Texas Sugars) -- and we'll refer to
24 them from here out as Texas Sugars -- did not pay her the
25 minimum wage required by the Fair Labor Standards Act,

1 also known as the FLSA.

2 Defendant denies each of plaintiffs' claims and
3 contends that each plaintiff was an independent
4 contractor, not an employee of Texas Sugars.

12:29:02

5 It is unlawful for an employer to require an employee
6 covered by the FLSA to work for less than minimum wage.

7 To succeed on her claim, each plaintiff must prove
8 each of the following facts by a preponderance of the
9 evidence:

12:29:18

10 One, plaintiff was an employee of defendant during the
11 relevant period.

12 And two, defendant failed to pay plaintiff the minimum
13 wage required by law.

12:29:30

14 The minimum wage required by the FLSA during the
15 period involved in this case was \$7.25 per hour. In
16 determining whether an employer has paid the minimum wage,
17 it is entitled to a credit for the reasonable costs of
18 furnishing certain noncash items to the plaintiff; such as
19 meals and lodging for the employee's benefit, if the
20 employee voluntarily accepts them.

12:29:48

21 Fair Labor Standards Act, overtime pay.

22 Each plaintiff claims that the defendant Texas Sugars
23 did not pay her the overtime pay required by the Fair
24 Labor Standards Act, the FLSA.

12:30:02

25 Defendant denies each of plaintiff's claims and

1 contends that each plaintiff was an independent
2 contractor, not an employee of Texas Sugars.

3 It is unlawful for an employer to require an employee
4 covered by the FLSA to work more than 40 hours in a
5 workweek without paying overtime.

12:30:17

6 To succeed on her claim, each plaintiff must prove
7 each of the following facts by a preponderance of the
8 evidence.

9 One, plaintiff was an employee of defendant during the
10 relevant period.

12:30:28

11 And two, defendant failed to pay plaintiff the
12 overtime pay required by law.

13 The FLSA requires an employer to pay an employee at
14 least one and one half times the employee's regular rate
15 for time worked over 40 hours in a workweek. A workweek
16 is a regularly recurring period of seven days or
17 168 hours. The phrase "hours worked" includes all time
18 spent by an employee that was primarily for the benefit of
19 the employer or the employer's business. If an employee
20 works more than 40 hours in one workweek, the employer
21 must pay the employee the overtime rate of 1.5 times the
22 regular rate for the time she worked after the first
23 40 hours. This is commonly known as time and a half pay
24 for overtime work. To calculate how much overtime pay
25 each plaintiff earned in a particular week, multiply her

12:30:42

12:31:02

12:31:20

1 regular rate of pay by one and a half times the regular
2 rate for all hours worked over 40 in that week.

3 Records of hours worked.

12:31:38

4 The law requires an employer to keep records of how
5 many hours its employees work and the amount they are
6 paid. In this case, each plaintiff claims that defendant
7 failed to keep and maintain adequate records of her hours
8 and pay. Each plaintiff also claims that the defendant's
9 failure to keep and maintain adequate records has made it
10 difficult for each plaintiff to prove the exact amount of
11 her claim.

12:31:52

12 If you find that defendant failed to keep adequate
13 time and pay records for each plaintiff and that each
14 plaintiff performed work for which she should have been
15 paid, each plaintiff may recover a reasonable estimation
16 of the amount of her damages. But to recover this amount,
17 each plaintiff must prove by a preponderance of the
18 evidence a reasonable estimate of the amount and extent of
19 the work for which she seeks pay.

12:32:06

12:32:27

20 Employee or independent contractor.

21 It is not always clear whether the law considers
22 someone an employee and it is not always clear who the law
23 considers someone's employer. Some people perform
24 services for others while remaining self-employed as
25 independent contractors.

12:32:42

1 In this case, you must decide whether plaintiff --
2 whether each plaintiff was an employee of defendant or an
3 independent contractor. You should answer this question
4 in light of the economic realities of the entire
5 relationship between the parties. There are a number of
6 factors you must consider, based on the evidence in this
7 case. The factors are, as follows:

8 One, who controls plaintiff's work. In an
9 employer/employee relationship, the employer has the right
10 to control the employee's work to set the means and manner
11 in which the work is done and to set the hours of work.
12 In contrast, an independent contractor generally must
13 accomplish a certain work assignment within a desired time
14 but the details, means and manner by which a contractor
15 completes the assignment are determined by the independent
16 contractor normally using special skills necessary to
17 perform that kind of work.

18 Two, how plaintiff is paid. An employer usually pays
19 an employee on a time worked, piece work, or commission
20 basis and an employer usually provides vacation or sick
21 time, insurance, retirement, and other fringe benefits to
22 the employee. An independent contractor is ordinarily
23 paid an agreed or set amount or according to an agreed
24 formula for a given task or job and no benefits are
25 provided.

1 Three, how much risk or opportunity the plaintiff has.
2 An independent contractor is generally one who has the
3 opportunity to make a profit or faces a risk of taking a
4 loss. But an employee is generally compensated at a
5 predetermined rate, has no risk of loss and has Social
6 Security taxes paid by the employer.

12:34:40

7 Four, who provides plaintiffs' tools, equipment and
8 supplies. An independent contractor usually provides the
9 tools, equipment and supplies necessary to do the job; but
10 an employee usually does not.

12:34:56

11 Five, how plaintiff offers her services. Independent
12 contractors generally offer their services to the public
13 or others in a particular industry, have procured the
14 necessary licenses for performing their services, and may
15 have a business name or listing in the phone book.

12:35:14

16 Employees ordinarily work for only one or just a few
17 employers and do not have business names or listings.

18 Six, the intent of plaintiff and defendant. The
19 parties' intent is always important but the description
20 the parties give to their relationship is not controlling.
21 Substance governs over form.

12:35:29

22 You should consider all the circumstances surrounding
23 the work relationship. An individual who performs
24 services for pay may be either an employee or an
25 independent contractor but cannot be both at the same

12:35:45

1 time. While no single factor determines the outcome, the
2 extent of the right to control the means and manner of the
3 worker's performance is the most important factor.

4 Jury Question Number 1. Has each plaintiff proved
12:36:07 5 that she was an employee of -- I'm sorry. Has each
6 plaintiff proved that she was an employee of defendant
7 Texas Sugars during the relevant period? Answer "yes" or
8 "no" for each plaintiff: Casey Nelson, Maylene Velasco,
9 Kristal Garcia, Veronica Gonzalez and Presley Lange.

12:36:20 10 If you answer "yes" to any one plaintiff, answer the
11 next question (but only answer with respect to those
12 plaintiff(s)). If your answer is no to all plaintiffs, do
13 not answer the next question.

14 If you find that defendant Texas Sugars violated the
12:36:44 15 FLSA, then you must determine the amount of any damages.
16 You should not conclude from the fact that I'm instructing
17 you on damages that I have any opinion as to whether any
18 of the plaintiffs have proved liability.

19 Jury Question Number 2. Has each plaintiff proved
12:36:59 20 that she is entitled to recover damages under the FLSA?
21 Only fill in the names of the plaintiffs who you found to
22 be employees under Question Number 1.

23 If your answer is "yes" as to any one plaintiff,
24 answer the next question. If you answer "no" to all
12:37:17 25 plaintiffs, do not answer the next question.

1 Jury Question Number 3. Have plaintiffs proved that
2 defendant Texas Sugars either knew its conduct was
3 prohibited by the FLSA or showed reckless disregard for
4 whether its conduct was prohibited by the FLSA?

12:37:35 5 Answer "yes" or "no."

6 If you answer "yes" to Question Number 3, you should
7 award damages for the three-year period from July 14,
8 2014, to July 14, 2017. If your answer to Question
9 Number 3 is "no," you should only award damages for the
10 two-year period from July 14th, 2015, to July 14, 2017.

11 Jury Question Number 4. What sum of money would
12 fairly and reasonably compensate each plaintiff for
13 minimum wage damages, if any, you have found defendant
14 Texas Sugars caused each plaintiff? Only calculate sums
12:38:15 15 for the plaintiffs for whom you have answered "yes" to
16 under both Questions 1 and 2. Answer in dollars and cents
17 for the following items and no other.

18 Total number of hours worked times \$7.25.

19 Jury Question Number 5. What sum of money would
12:38:40 20 fairly and reasonably compensate each plaintiff for
21 overtime damages, if any, you have found defendant Texas
22 Sugars caused each plaintiff? Only calculate sums for the
23 plaintiffs for whom you have answered "yes" to under both
24 Questions 1 and 2. Answer in dollars and cents for the
12:38:51 25 following items and no other.

1 \$7.25 times 1.5 times all hours worked over 40 in a
2 workweek.

3 Counsel for the plaintiff, do you wish to make an
4 opening final argument at this time?

12:39:29 5 MR. COOK: Yes, Your Honor.

6 THE COURT: You may proceed.

7 MR. COOK: Can I have the document camera,
8 please.

9 Ladies and gentlemen, when I talked to you a little
12:39:47 10 bit about what this case is about, we weren't really able
11 to get into this too much when we first came down here in
12 the morning on Monday. But this case is about kind of two
13 things. It's about minimum wage, but what it's really
14 about is the club having its hand in the pocket of the
12:40:06 15 dancers and actually reducing their wage below zero, the
16 base wage that they pay, and actually taking money away
17 from them.

18 We talked about in the beginning there is a spectrum
19 between employees on one side, independent contractors on
12:40:23 20 the other. And your job is going to be to figure out
21 where on that spectrum do the dancers belong. A properly
22 paid, tipped employee is permitted to keep all of their
23 tips. That's why the dancers want to be properly paid
24 tipped employees.

12:40:44 25 An independent contractor is not like the dancers.

1 Independent contractors, like plumbers and electricians
2 and IT folks and things like that, have a different
3 economic reality -- you'll see that word. It's two words
4 right in the charge -- than employees, tipped employees
5 like dancers.

12:41:05

6 You heard several factors. I'm going to go over them
7 with you and, based on what I believe the evidence was
8 that came in, and I'll show why dancers are more like
9 employees and less like independent contractors.

12:41:26

10 The first factor is who controls the work. Moments
11 exercised control of the dancers in the following ways:

12 They compelled the dancers to go on stage. They
13 charged them a fine if they did not.

12:41:43

14 They charged dancers for coming to work late. The
15 corporate representative admitted that the scale goes up
16 the later people come in. And they charged dancers for
17 leaving early.

18 They required certain dance attire. They required
19 certain kinds of shoes.

12:41:54

20 They charge money for tips and deejays and things of
21 that nature.

22 They required the dancers to check in. Just like a
23 waitress punching a time clock, as soon as they come in,
24 they have to go check in.

12:42:09

25 They required the dancer to be inspected.

1 They supervise the dancers. If you'll recall,
2 Mr. Khorshidpanah admitted that he was a supervisor of the
3 dancers. The managers that supervised the dancers
4 actually entered the dressing room to patrol the dressing
5 room. Mr. Khorshidpanah told us that.

12:42:24

6 That Moments says that they need to know what
7 medications the dancers are taking and they actually
8 patrol for that as well.

9 They required that all the credit card transactions
10 that are done that are supposedly for the benefit of the
11 dancers be done at the bar or by a waitress so that the
12 club can take an additional charge on top of what the
13 dancer would be getting. Normally the dancer gets \$20 and
14 \$25 if it's done by a credit card.

12:42:37

15 Moments requires dancers to work. Remember we talked
16 with Mr. Khorshidpanah about the minimum number of dancers
17 in the club? Nobody is going to go to the club if there
18 aren't women there. And so the club has a minimum. They
19 want eight dancers, or they want 12 dancers, depending on
20 whether or not you believe what Mr. Khorshidpanah said on
21 the stand or what he said earlier. But they have to have
22 dancers. So they have to get dancers to come in.

12:42:55

12:43:13

23 The deejays control the music. Again, a club employee
24 controlling the means and method. If the deejay plays
25 five-minute long songs, the dancers make less money. If

12:43:29

1 the deejay plays two-minute songs, the dancers make more
2 money.

3 They are generally very similar to the way waitresses
4 are treated, especially at Moments. At Moments the
5 waitresses are not paid anything other than their \$2.13 an
6 hour and their tips. The dancers are not paid at all.

7 The dancer gets to keep some of her tips. The waitress
8 gets to keep all of her tips. The waitress has to serve
9 patrons that come in, unless they are rude, harassing or
10 drunk or something like that, just like dancers. And
11 waitresses can refuse to serve patrons, just like a dancer
12 can.

13 With regard to how they are paid, you see the
14 similarity because they are both tipped employees. The
15 difference is waitresses get a minimum of \$2.13 guaranteed
16 up to \$7.25 if there are insufficient tips and the dancers
17 don't.

18 Neither of them get any fringe benefits. There is no
19 health insurance. There is no retirement benefits. I
20 recall Mr. Wallace asking that question over and over to
21 the dancers. That's true of the waitresses as well.

22 Lastly, neither is paid a set amount or fee. And
23 there is one person we did hear about in this case who is,
24 and that was Bridget the Midget. I know it's a silly
25 stage name but she, if we recall the testimony from

1 Mr. Khorshidpanah, she gets a set fee based on a contract
2 to perform a certain number of days at the club. That is
3 what an independent contractor looks like in these
4 circumstances.

12:45:15

5 With regard to risk and opportunities, the dancers
6 again are just like the waitresses. They have the
7 opportunity that somebody is in the club wanting to spend
8 a lot of money and they are going to have a great night
9 and take a lot home in tips. They have the risk that the
10 club is going to be slow, there is nobody there, not a lot
11 of money changes hands, and they are going to go home with
12 very little.

12:45:31

13 The only difference is the dancers can go home with
14 zero because they aren't paid, and the waitresses have a
15 minimum. In fact, the dancers have to pay a fee there.
16 So they can actually go home with less than zero. That's
17 what we're saying shouldn't happen, not evidence that it's
18 okay for that to happen.

12:45:45

19 If paid properly, dancers and entertainers and
20 waitresses would have the same risks. A good night is a
21 good night. A bad night is a bad night. But nobody is
22 going into the hole.

12:46:03

23 With regard to the tools and equipment -- I took this
24 down from the testimony -- the dancers pay for their
25 outfits, their hair, their shoes, and things of that

12:46:19

1 nature.

2 This is on a yearly basis what the club pays for.

3 They pay \$36,300 a year in deejays. They paid, at one
4 point, \$7,000 for the lighting system. I don't know how

12:46:35

5 much they pay to maintain it. They paid some unknown

6 amount for the sound system. They pay thousands of

7 dollars a year for their liquor license, between \$120,000

8 and \$144,000 a year in alcohol, \$96,000 a year in rent,

9 \$120,000 in payroll, \$36,300 a year in bouncers, \$36,300 a

12:46:56

10 year in managers, between \$100,000 and \$200,000 for the

11 general manager, \$6,000 in magazine ads when they were

12 running those ads, and \$65,000 in security. The total is

13 about \$615,000 a year to run Moments. So when you are

14 asked who supplies the necessary instrumentality for the

12:47:17

15 work of the dancers, it's overwhelmingly the club.

16 I would also like to point out that the managers, the

17 amount of \$100, two shifts, \$100, that gets us to the

18 \$36,300 over the course of a year, that's for how many

19 managers did we hear about? Four? We are supposed to

12:47:41

20 believe that these four managers are splitting \$36,300 a

21 year? I think that shows that, in fact, the real money is

22 being made by the managers because they require tips from

23 the dancers.

24 The club provides the building, the music, the stage,

12:47:54

25 the pole, the furnishings, the decor, the food, the

1 drinks, the waitresses, the cooks, bartenders, janitors,
2 hostesses, managers, bouncers, security, security cameras,
3 parking lot, and registration in Harris County in order to
4 run a sexually-oriented business, a liquor license and
12:48:13 5 other licenses. The girls provided their hair and makeup
6 and shoes.

7 The services are not offered to the public as a
8 dancer. They are not going around people's homes or
9 hotels or anywhere offering to dance for whoever is
12:48:25 10 willing to pay for their services. In fact, they only
11 offer their services to the members of the public that
12 enter Moments, just like the waitresses. The waitresses
13 serve people that come to Moments.

14 The dancers aren't out soliciting employment as a
12:48:45 15 dancer for limited periods of time to come to a bachelor
16 party or things of that nature. They go to Moments to
17 work.

18 They don't have their own business where they keep
19 records and have business cards and run advertisements.
12:49:01 20 They go to Moments, whom they are economically dependent.

21 And again, let's go back again to Bridget the Midget.
22 That is what an independent contractor looks like on this
23 test. She offers her services to different clubs who pay
24 her to appear.

12:49:18 25 Just like a waitress can work at one restaurant and

12:49:38

1 another restaurant in the same time, a dancer can work at
2 one club and another club. But the question is when the
3 dancer works at the same club for 11 years or 10 years,
4 for four years, is that dancer really in business for
5 themselves or are they an employee of that club?

12:50:02

6 Intent. Intent is a really interesting question here.
7 I absolutely agree that none of the dancers would ever
8 intend to make \$7.25 an hour. They make more than that.
9 The intent though, the intent was that they would get to
10 keep all of the tips that they earn. That's what happens
11 when you are an employee who is properly paid under the
12 FLSA. You get to keep all the tips that you earn. The
13 intent of the employment relationship was that the dancers
14 would work at one place, would serve their customers,
15 Moments' customers, that they would dance for Moments'
16 customers, and they would receive tips, and they would
17 keep those tips.

12:50:21

12:50:36

18 What happens is they have to pay money to Moments just
19 to get in the door. It was clearly established and not
20 disputed by Mr. Khorshidpanah. They then have to tip
21 deejays, tip the bartenders, tip the managers.

12:50:55

22 So when you get to the question of intent, ask not
23 what -- well, did I intend to be an independent
24 contractor? Did I intend to get -- as opposed to get
25 \$7.25 an hour? That's not the question. The intent was

1 that they would get to keep all their tips.

2 I want to turn now to looking at the charge with you.
3 And the first thing I want to just highlight on the charge
4 is this instruction on records of hours worked. Because
12:51:27 5 no records were kept, we are not able to provide the level
6 of detail and exactitude that we would like to.

7 Obviously, I would love to come in here with a time clock
8 and say they clocked in at this time and they clocked out
9 at that time and I can prove it to the minute. But no
12:51:43 10 records were kept. No documents. So I have -- we are
11 unable to do that.

12 Because of that, we have to rely on the dancers'
13 testimony. If you recall, one of the things that dancers
14 do is they are provided alcohol as part of their
12:51:58 15 socializing with people, and so their memories may not be
16 exact. We have to live with what we have.

17 With regard to Jury Question Number 1, I believe, as I
18 have explained, we believe that all five plaintiffs have
19 established that they are employees of Moments.

12:52:17 20 If they are employees and you determine that they did
21 any work for which they were not properly paid, then you
22 should answer this question "yes," they have FLSA damages.

23 On the question of willfulness, I submit to you that
24 an owner of a business who closes their eyes, who stops up
12:52:41 25 their ears and does no investigation whatsoever is acting

1 in reckless disregard of whether or not their conduct is
2 prohibited by the FLSA. They have lawyers. They have --
3 the Department of Labor is available as a governmental
4 institution that will answer their questions. But they
5 didn't ask. They did nothing to find out whether or not
6 they were paying their dancers properly.

7 With regard to the question on damages, I took notes
8 and I want to share with you what I had for -- in terms of
9 the number of hours worked.

10 With regard to Ms. Velasco, I had that she testified
11 to working Tuesday, Wednesday, Thursday and Friday and
12 every other Saturday, which would mean that you could take
13 the number of weeks at issue -- depending on your answer
14 to Jury Question Number 3, there will be a different
15 number of weeks at issue -- multiply by four for one set
16 of weeks and five for one set of weeks or just multiply by
17 4.5 to get an estimate and multiply by \$7.25 an hour.

18 So if you were to find that there were 95 weeks in the
19 period -- she testified she started working in June of
20 2013 to 2015 as a dancer. If you found that that was all
21 compensable, you would take 95 weeks, multiply by four and
22 a half, multiply by \$7.25 in order to get the total number
23 of hours worked. She indicates -- or excuse me -- to get
24 the total number of hours per week. To get the total
25 number of hours worked, you would then multiply by what

1 she testified the amount of work that she did in each
2 shift.

3 And Ms. Nelson testified that her average shifts were
4 between six and ten hours. It's up to you to decide
12:54:42 5 whether or not you think the average is six, ten, or
6 somewhere in between. But what you should do is calculate
7 the total number of weeks, multiply by the number of hours
8 in the shift -- so the number of days in a week that each
9 dancer says they worked and the number of hours in each
12:54:59 10 shift on each day, multiplied by the total number of
11 weeks.

12 It's kind of mathy. I know it is a -- I'm sure they
13 will give you a calculator to do the math.

14 With regard to Ms. Nelson, she worked four days a week
12:55:12 15 and every other Saturday for six to ten hours a day.

16 Ms. Gonzalez testified that she worked four days a
17 week and every other weekend for seven hours a day.

18 Ms. Garcia testified to working five or six days a
19 week. We would ask you to consider five. It's up to you
12:55:33 20 if you want to do six. And that she worked between eight
21 and ten hours or 12 hours, if they were doubles. You can
22 determine where in that range is appropriate.

23 Presley Lange testified that she worked between three
24 and five days a week, some were doubles, for eight hours
12:55:48 25 each shift.

1 And Maylene Velasco testified that she worked a bunch,
2 that she would only take two or three nights off in a
3 month. I think that we would be comfortable understanding
4 that she probably did miss more time than she is
12:56:08 5 remembering today. And so we are only going to ask you to
6 consider five days a week for her. She testified that she
7 would work as many as ten -- excuse me -- as many as seven
8 hours a shift. And so we would consider seven hours a
9 shift for her.

12:56:27 10 Bringing you back to what I started with, this is not
11 a case where dancers are claiming they are owed \$7.25 an
12 hour and that is what they want. They want the
13 protections of the FLSA. They want to be treated like
14 tipped employees because they are much more like
12:56:44 15 waitresses and much less like Bridget the Midget, who is
16 an independent contractor.

17 I look forward to hearing from you guys. Thank you
18 very much.

19 THE COURT: Does the defense wish to make a
12:57:09 20 closing argument at this time?

21 MR. WALLACE: Yes, Your Honor.

22 THE COURT: You may proceed, sir.

23 MR. WALLACE: Members of the jury, on behalf of
24 Mr. Khorshidpanah and Texas Sugars, I want to thank you
12:57:19 25 for spending the last three days here in the courthouse

1 with us and listening to the evidence, some of which has
2 been repetitive and you have heard much of the same
3 testimony over and over again. You have been patient.
4 You have been attentive and you have been listening and I
5 want to thank you for that.

12:57:36

6 I do want to talk to you about the evidence that has
7 been presented in the case, and I do want to talk to you
8 some about the instructions that the Judge has given you
9 and that you will receive on paper when you go back into
10 the jury deliberation room.

12:57:48

11 I'll start out by telling you that there are five
12 plaintiffs in this case. And all five of them came up
13 here and testified. And all five of them are asking for a
14 whole lot of money. They have a vested interest in the
15 outcome of this case.

12:58:07

16 There is a defendant in this room, Texas Sugars, Inc.,
17 that has a vested interest, also. It wants to maintain
18 that it does not treat its -- that its entertainers are
19 not employees and that they are not liable under the Fair
20 Labor Standards Act.

12:58:33

21 As the Judge has told you in his instructions, an
22 individual who performs services for pay may be either an
23 employee or an independent contractor but cannot be both
24 at the same time.

12:58:49

25 This is not a spectrum, as you were told by opposing

1 counsel. It's either you're an employee or you're not an
2 employee. The Fair Labor Standards Act covers employees.

12:59:07

3 Okay. So you have five plaintiffs that came up and
4 told you one story. You had Texas Sugars that told you
5 the other. And both cannot be true. They are either an
6 employee or they are not.

12:59:26

7 So who are you to believe? Well, we contend that you
8 can believe the three independent witnesses that came up
9 here who are neither plaintiffs nor defendants, who are
10 entertainers at Moments, who came up here and told you
11 exactly what really goes on in that club as far as the
12 relationship is, and that they are independent contractors
13 that have every intent to be independent contractors and
14 are not going to work there and we submit nor would any
15 other dancer ever work at any club classified as an
16 employee, given a schedule, told to come in and work for
17 \$7.25 an hour, much less \$2.13 an hour.

12:59:43

01:00:03

18 Much has been made about, well, they would get \$2.13
19 an hour plus their tips. Well, the evidence that was
20 presented by both the plaintiffs' witnesses and our
21 witnesses was they get fees for dancing, \$20 a song.
22 That's not a tip, ladies and gentlemen. A man who comes
23 and mows your lawn and knocks on your door and says, I'd
24 like to mow your lawn, and I'll do it for \$20. You say,
25 Okay. Deal.

01:00:22

1 After it's done, he knocks on your door and says,
2 Where is my tip? No. He says, Where is my \$20, the fee
3 we pre-negotiated for my services of mowing the lawn.
4 It's just like dancing.

01:00:33

5 So it's not a tip. They don't get paid \$7.25 an hour
6 and then get to hold on to the fees. Those fees become
7 the property of the house. That's the employment
8 relationship.

01:00:49

9 Just like a waitress, when she works \$2.13 an hour,
10 she doesn't get to keep the money that the patrons pay for
11 their liquor or their beer or their wine. If she gets a
12 tip on top of that, she gets to keep it. Much like a
13 dancer. It's a tip on top of the \$20 per song that she
14 gets to keep. But don't confuse these dance fees as tips.

01:01:09

15 So the question really for you all is: How do you
16 determine who an employee is? And you'll find that in the
17 Judge's instructions to you as set out on Pages 9 and 10
18 of your jury instructions. And there are -- you will see
19 on Pages 9 and 10 the five -- excuse me -- the six factors
20 that are set out by Judge Bennett.

01:01:41

21 And I'll ask you to recall, when I cross-examined the
22 witnesses that came to this stand, both the plaintiffs and
23 our witnesses that we brought to the stand, I'll ask you
24 to remember that I asked each one of them or I tried to
25 ask each one of them, I want to ask you about six

01:02:01

1 individual topics. Do you remember that? That's these
2 six topics because we wanted to prove to you that they are
3 not employees.

01:02:16

4 So let's go to the first topic. In an
5 employer/employee relationship, the employer has the right
6 to control the employee's work, to set the means and
7 manner in which the work is done and to set the hours of
8 work.

01:02:30

9 In contrast, as Judge Bennett's instructions provide,
10 an independent contractor generally must accomplish a
11 certain work assignment within a desired time but the
12 details, means and manner by which the contractor
13 completes that assignment are determined by the
14 independent contractor normally using special skills
15 necessary to perform that kind of work.

01:02:44

16 We know what the evidence is. The dancers came when
17 they wanted to work on the days they wanted to work and
18 didn't work when they didn't want to work. They danced
19 the way they wanted to dance. They danced for the
20 customers they wanted to dance for. They danced when,
21 where and how they wanted to perform.

01:02:57

22 But you don't need to believe me because argument of
23 counsel, as Judge Bennett rightfully said, is not
24 evidence. Let's see what the evidence does say. Let's
25 take Ms. Gonzalez's testimony, one of the plaintiffs.

01:03:13

1 "QUESTION: Moments didn't tell you when to dance?

2 "ANSWER: Right.

3 "QUESTION: If you did not want to dance for a
4 particular customer, you did not have to?

01:03:25 5 "ANSWER: Correct.

6 "QUESTION: You could easily refuse to dance for
7 someone or anyone, correct?

8 "ANSWER: Right.

9 "QUESTION: No one at Moments ever provided a written
01:03:33 10 schedule to you, correct?

11 "ANSWER: No.

12 "QUESTION: If you don't want to dance, you can simply
13 stay at home, right?

14 "ANSWER: Right."

01:03:43 15 The dancers control their work. They control when
16 they work, how they work, how much they charge, who they
17 charge it to, and the amount of money they make in a given
18 evening. Once they make their money, they go home. If
19 they want to work a double, they can work a double, what
01:04:01 20 they call a double. All right.

21 Number two, how is the plaintiff paid? An employer
22 usually pays an employee on a time worked, piece work, or
23 commission basis, and an employer usually provides
24 vacation or sick time, insurance, retirement and other
01:04:16 25 fringe benefits. An independent contractor is ordinarily

1 paid an agreed or set amount or according to an agreed
2 formula for a given task or job and no benefits are
3 provided.

4 We know what the evidence in this case shows.

01:04:28

5 No. Go back, please.

6 And that is that they were paid on an agreed or set
7 amount of \$20 or, according to an agreed formula, \$20 per
8 song, for a given task or job, meaning a lap dance.

9 That's how they are paid. But don't believe me. Let's

01:04:49

10 see what Ms. Gonzalez says.

11 "QUESTION: I want to switch to my second topic, and
12 that's how you are paid as an entertainer. Moments does
13 not pay you for the time worked, correct?

14 "ANSWER: They don't.

01:05:00

15 "QUESTION: No piece work?

16 "ANSWER: No.

17 "QUESTION: Not on a commission basis?

18 "ANSWER: No.

19 "QUESTION: Not correct or they don't pay you on a
20 commission basis?

01:05:08

21 "ANSWER: They don't.

22 "QUESTION: They provide you no vacation time or sick
23 time, correct?

24 "ANSWER: Correct."

01:05:15

25 Go back to the instruction. That's what an employer

1 does. He provides sick time, vacation time, pays them on
2 a commission basis or for piece work. That didn't happen
3 in this case. They are paid on the set rate they
4 negotiate with their customers.

01:05:42

5 Keep going to the next slide, please.

6 "QUESTION: They provide you with no insurance,
7 retirement or other fringe benefits. You are paid on an
8 agreed set amount for dancing between you and your
9 customer, correct?

01:05:54

10 "ANSWER: Right.

11 "QUESTION: And that's usually \$20 a song, right?

12 "ANSWER: Yes."

01:06:04

13 Let's go to the next one. The third topic that is
14 outlined by Judge Bennett on Pages 9 and 10 of the jury
15 charge you are going to get provides that an independent
16 contractor is generally one who has the opportunity to
17 make a profit or faces a risk of taking a loss; but an
18 employee is generally compensated at a predetermined rate,
19 has no risk of loss, and has social security taxes paid by
20 the employer.

01:06:18

21 You all remember what the testimony was. I don't need
22 to go over it with you. The dancers have all the risk.
23 If they come in and just sit there and don't do anything,
24 they are not going to make any money. If they go in there
25 and they entertain the customers, they are going to make a

01:06:33

1 lot of money at twenty minute -- \$20, excuse me, for two
2 and a half to three minutes of work because that's the
3 length of the song. That was the testimony from the
4 witness stand.

01:06:44

5 Some of them spend -- one witness testified, I spent
6 an hour back in the VIP room. I danced the whole time.
7 Three-minute songs times 20 songs. Is that how it works?
8 Anyway, she makes \$400 for being back there.

9 But let's see what Ms. Gonzalez testified about.

01:07:03

10 "QUESTION: The third topic, do you have an
11 opportunity to make money?

12 "ANSWER: Yes.

13 "QUESTION: Sometimes you have an opportunity to make
14 a lot of money?

01:07:16

15 "ANSWER: Yes.

16 "QUESTION: Do you have a risk of taking a financial
17 loss?

18 "ANSWER: Yes."

19 The risk is all on the entertainer and the opportunity
20 to make a substantial sum of money is all on the
21 entertainer. If she wants to come to work, she can come
22 to work. If she doesn't want to come to work, she doesn't
23 have to come to work.

01:07:32

24 Let's go to the next page.

01:07:46

25 "QUESTION: Do you get compensated, paid money, at a

1 preexisting rate on a nightly basis, a weekly basis, or a
2 monthly basis?"

3 And she answered, "Yes. I mean, I get paid from the
4 customers, not from the bar or from the club."

01:08:00

5 I asked her, "But it's not a preexisting rate." Those
6 words being used directly in the jury charge that Judge
7 Bennett has read to you and will give to you, they are not
8 paid on a preexisting rate.

01:08:12

9 And Moments, I asked, does not pay your social
10 security?

11 And her answer was, no, they don't pay our social
12 security.

13 Again, that directly comes out of the jury charge.
14 Directly. That defines an independent contractor.

01:08:24

15 All right. Let's go to the next factor. An
16 independent contractor usually provides the tools,
17 equipment and supplies necessary to do the job but an
18 employee does not. Let's not listen to my statement.
19 Let's listen to what Ms. Gonzalez said.

01:08:43

20 "QUESTION: The next subject I want to go to, and it's
21 the fourth subject, is who provides your tools, equipment
22 and supplies?

23 "ANSWER: I do.

24 "QUESTION: You provide one hundred percent of them?

01:08:57

25 "ANSWER: Right.

1 "QUESTION: No one at Moments provides you with the
2 tools, equipment and supplies necessary to do your job,
3 correct?"

4 Her answer was, "Right."

01:09:07

5 That's the fifth indicia of why she is an independent
6 contractor -- fourth indicia. Pardon me.

01:09:29

7 The fifth test or the fifth instruction that you have
8 on Page 10 of Judge Bennett's instructions is how did
9 plaintiff offer her services. Independent contractors
10 generally offer their services to the public. Remember, I
11 asked the dancers, Do you provide your services to the
12 public or do you provide it to the bouncers, the managers,
13 the deejays and people associated with Moments? Every one
14 of them said I offer it to the public, the public that
15 walked through that door.

01:09:44

16 Let's go to the -- let's see what some of the
17 testimony is.

01:09:59

18 "QUESTION: The fifth topic I want to talk to you
19 about is how you -- how and to whom you offer your
20 services -- are you with me?

21 "ANSWER: Yes.

22 "QUESTION: -- as an entertainer.

23 "ANSWER: I am.

01:10:07

24 "QUESTION: You offer your services to the general
25 public when they come into the bar, don't you?"

1 And her answer was, "Right."

2 And the next page.

3 "QUESTION: And when you have danced at other clubs,
4 it's the same way. You are offering services to the
01:10:21 5 customers and to the general public when they come in the
6 front door, right?

7 "ANSWER: Right.

8 "QUESTION: You do not offer dancing services to the
9 bar backs or hostesses or security guards?

01:10:31 10 "ANSWER: Right.

11 "QUESTION: You are offering it to the general public,
12 correct?

13 "ANSWER: Right."

14 That's the fifth test outlined in Judge Bennett's
01:10:40 15 instructions to you.

16 And finally, let's go to the sixth indicia that Judge
17 Bennett has instructed you to examine and that is the
18 party's intent is always important but the description the
19 parties give to their relationship is not controlling.

01:10:53 20 Substance governs over form.

21 Well, what was the intent of those dancers when they
22 walked in the front door? They intended to be independent
23 contract dancers. They intended to be in there to make
24 \$20 a song or \$30 a song or whatever they charged, to get
01:11:12 25 those fees from their customers when they danced for them.

01:11:32

1 They did not intend to be a \$2.13 an hour employee
2 with a schedule and a uniform and all the other things
3 that come with being an employee. We have all been
4 employees. You report to work when you are told. You
5 work your shift. You do what you are told to do while you
6 are there, and you get a paycheck at the end of the day.

01:11:50

7 That's not what these dancers intended to do at all,
8 and that's not what Moments intended to do at all. It was
9 a contract with them to be independent contractors. What
10 is the testimony?

01:12:04

11 "QUESTION: Last but not least, on the six topics that
12 I wanted to talk to you about was your intent and if you
13 know the intent of the club. So let's talk about your
14 intent. When you went there" -- and this is the testimony
15 of Ms. Gonzalez. If you'll recall, she started out as a
16 hostess/waitress and moved to be a dancer -- "when you
17 went there, you would as a dancer" -- and I said, "Well,
18 strike that. When you first started working there, you
19 intended to work as an employee, correct?"

01:12:23

20 "ANSWER: Yes.

21 "QUESTION: As a door hostess and as a waitress?

22 "ANSWER: Right.

01:12:34

23 "QUESTION: And it was later your voluntary decision
24 and intent to move to an independent contractor dancer at
25 Moments, correct?

1 "ANSWER: Right."

01:12:49

2 She wanted to make more money, and she wanted to
3 perform as an independent contractor and have all the say
4 in the world over her schedule, over her routine, what
5 days do they come in, what times do they come in, does it
6 fit with their childcare needs that they can come in later
7 or come in earlier, what is it that helps them out? They
8 are not -- they are not employees.

01:13:08

9 Members of the jury, on Page 11 of the jury
10 instructions that Judge Bennett is going to give you, he
11 asks: Has each plaintiff proved that she was an employee
12 of defendant Texas Sugars during the relevant time period?

01:13:33

13 The answer, I submit, that you should put on this form
14 are five big fat nos. If you put those five nos on there,
15 your job is done, and you can go home. There is nothing
16 for you to consider about damages. There is nothing for
17 you to consider about anything else. They have not proven
18 their case. They are not employees as a matter of law.
19 And if you look at Judge Bennett's instructions, I think
20 you can conclusively come across that, no, they weren't
21 employees.

01:13:54

01:14:11

22 But Judge Bennett has given you instructions about
23 damages, and so I have got to address it. Okay. On
24 Page 8 of the instructions -- again, these instructions --
25 Judge Bennett says that the plaintiffs must have evidence

1 of a reasonable estimate of the amount and extent of the
2 work for which she seeks pay.

3 Did you all hear a reasonable amount of hours that any
4 plaintiff worked? Or did you just hear, Oh, well, you
01:14:30 5 know, I worked doubles and I went in on Tuesdays and
6 Wednesdays and Thursdays and sometimes on Saturdays?

7 Did you ever hear, you know, gosh, I didn't keep
8 records either and neither did Texas Sugars, but I
9 estimate over this three-year period or this two-year
01:14:47 10 period that I worked 1,500 hours. And I would say a
11 thousand of them were regular time and 500 of them was
12 overtime.

13 You do the math, jury. You figure that out. \$7.25
14 times a thousand and \$10.86 times 500. Sure, you could do
01:15:01 15 that, if you had any evidence at all as to how much time
16 they actually worked, but you don't have anything. You
17 have been left completely in the dark to guess for each
18 plaintiff and all plaintiffs how much time they worked.

19 Can any of you independently recall how many hours
01:15:25 20 Maylene Velasco, the last plaintiff, worked? I mean, at
21 one time she said, Oh, well, I worked every single day. I
22 worked every day. Maybe I took a couple of days off a
23 month. Never worked at any other club. Only worked at
24 Moments.

01:15:44 25 Well, on cross-examination she had to admit, well, no,

01:16:00

1 she worked for Glamour Girls. Why did she have to admit
2 that? Because we showed she got arrested for prostitution
3 while at Glamour Girls at the same time she said she was
4 working at Moments. She spent days in jail. She couldn't
5 have been at Moments if she was in jail. But she said she
6 worked every day. Maybe took two days off a month.
7 Maybe.

01:16:13

8 Who works every day? I don't want you to hold up your
9 hands because it's not a test for you all. I don't work
10 every day. Do you know anybody that works every day?
11 It's not legal, and you don't have anything to base
12 damages upon. Nothing.

01:16:31

13 I submit you find no liability. If you put no on all
14 that, you don't even have to get to that question. But if
15 you found that a dancer or you felt they were employees,
16 how on earth can you say how much they should have been
17 paid when you don't know how much they worked? It would
18 be pulling it out of thin air and guessing it, and I
19 submit to you that the plaintiffs have wholly failed to
20 provide you with the necessary evidence that you need to
21 even come to the damage calculation if you were to do so.

01:16:46

01:17:12

22 You have heard evidence that they had to wear 3-inch
23 heels. Some of their witnesses said you had to have
24 6-inch heels. Our witness said, I dance in flats. They
25 don't control the way I do my dancing.

1 Those three independent witnesses that came up here
2 and told you the truth, told you the truth because they
3 were under oath and had an obligation to tell you the
4 truth. They didn't hide who they were. They didn't hide
5 what they were, and they didn't try to stretch out this I
6 work every day kind of stuff. They were forthright with
7 you, and I hope you give them a lot of credibility.

8 I will tell you on behalf of Mr. Khorshidpanah here
9 that he really appreciates the time and effort that you
10 all have put into this. It's been a long three days. You
11 have heard a lot of evidence. I'm going to ask you to use
12 your common sense, and Mr. Khorshidpanah is going to ask
13 you to use your common sense.

14 What is really going on here? You have got five
15 people who are disgruntled and unhappy and want to make
16 one last stab at a cash grab. It shouldn't fly. It
17 shouldn't work.

18 Respectfully, we ask that you return a verdict that is
19 on Page 11 of 18. No, no, no, no, and no. They are not
20 employees. Whether or not that's -- you might
21 individually think that's fair or right -- individually
22 think it's wrong or right, remember that each of you swore
23 that you would apply the law as the Judge gave it to you,
24 and the Judge has given you the six factors to consider.
25 You have got the evidence that meets those six factors

1 that they are not employees.

2 Thank you so much for your time and consideration. I
3 look forward to your verdict.

01:19:10

4 THE COURT: Does the plaintiff wish to offer a
5 rebuttal argument?

6 MR. COOK: Very much so, Your Honor.

7 THE COURT: You may proceed.

01:19:26

8 MR. COOK: Ladies and gentlemen, if the question
9 that was posed to you was are dancers independent
10 contractors with regard to the patrons who enter Moments,
11 you would find, yes, they are independent contractors. If
12 you look at those factors and the way that the defendant
13 has presented them to you, it is asking about how they are
14 treated by their patrons. Just like a waitress. When a
15 waitress comes to your table, you don't -- you don't have
16 an ongoing relationship with them. They are serving you
17 individually, just like the lawnmower example that
18 Mr. Wallace used.

01:19:51

01:20:11

19 When you look at it through the lens of what is the
20 relationship between the club and the dancer, those
21 relationships change. The only reason the dancers don't
22 have the pay that one of the factors is, is because it's
23 being illegally denied them. They are supposed to receive
24 it, and they are not.

01:20:34

25 We talked about the dancers are not controlled because

1 they are not -- they don't have a schedule. Well, the
2 dancers said that they did. They had to work regular
3 schedules. They weren't on paper. That's not how the
4 club runs. It was verbally. Get in here. We need you.
01:20:51 5 They worked regular schedules. And if they didn't work on
6 a Monday or a Tuesday, they wouldn't be allowed to work a
7 Friday or Saturday, the more lucrative days. The club
8 exercised control over their schedules to a limited
9 extent, to be fair.

01:21:04 10 The reason I say it's a spectrum is not because you
11 can be a little bit independent contractor and a little
12 bit employee. Mr. Wallace is absolutely right about that.
13 They are either one or the other. The spectrum that I am
14 talking about is you could look an awful lot like one, in
01:21:19 15 which case you probably are, and look an awful lot like
16 the other, in which case you probably are, or somewhere in
17 the middle. You ladies and gentlemen will decide.

18 My point with the spectrum is that if you view it that
19 way, the dancers and waitresses and totally truly tipped
01:21:34 20 employees are here and dancers are here and Bridget the
21 Midget is here and your plumber is over here. So where do
22 you draw that line? Wherever you draw that line, I submit
23 that the dancer is on the employee side of it because they
24 are dependent on the club.

01:21:48 25 The club provides everything that is necessary, except

1 the clothes on their back. The club provides the patrons.
2 The club controls the music, the decor. The club controls
3 their opportunity to make money based on who they get in
4 the door.

01:22:10

5 Let's talk about the credibility of the witnesses and
6 a little bit about what makes a person an employee or an
7 independent contractor. I think one of the most shocking
8 things -- I have never heard of anybody when they are sued
9 and an independent contractor is summoned as a witness

01:22:28

10 that that person hires them a lawyer to protect them, not
11 to protect the club. The club has lawyers, able lawyers.
12 But the club hired a lawyer to go and represent their
13 independent contractor, who is not their employee, when we
14 took the independent contractor's deposition, the
15 independent contractor.

01:22:51

16 That, in my mind, shows a level of control and also
17 shows a reason why the testimony you heard from the two or
18 three declarants that had -- that were summoned by the
19 defendant may have been different than that summoned by
20 the plaintiff. They had ongoing relationships. This is
21 their boss. They could -- Moments can say, you know what,
22 don't come back. We didn't like the way you testified.
23 Don't come back. And these girls do make money.

01:23:12

24 Again, this is not a case about \$7.25 an hour. This
25 is a case about getting the club's hand out of the

01:23:29

1 dancer's pocket.

2 Thank you for your attention.

3 THE COURT: Lady and gentlemen of the jury, it is
4 now your duty to deliberate and to consult with one
01:23:57 5 another in an effort to reach a verdict. Each of you must
6 decide the case for yourself, but only after impartial
7 consideration of the evidence with your fellow jurors.

8 During your deliberations, do not hesitate to
9 re-examine your own opinions and change your mind if you
01:24:12 10 are convinced that you were wrong, but do not give up on
11 your honest beliefs because the other jurors think
12 differently or just to finish the case.

13 Remember, at all times, you are the judges of the
14 facts. You have been allowed to take notes during this
01:24:28 15 trial. Any notes that you took during this trial are only
16 aids to memory. If your memory differs from your notes,
17 you should rely on your memory and not on the notes. The
18 notes are not evidence.

19 If you did not take notes, rely on your independent
01:24:44 20 recollection of the evidence and do not be unduly
21 influenced by the notes of other jurors. Notes are not
22 entitled to greater weight than the recollection or
23 impression of each juror about the testimony.

24 When you go into the jury room to deliberate, you may
01:25:00 25 take with you a copy of this charge, the exhibits that

Jury Deliberation

1 have been admitted into evidence, and your notes. You
2 must select a jury foreperson to guide you in your
3 deliberations and to speak for you here in the courtroom.

01:25:15

4 Your verdict must be unanimous. After you have
5 reached a unanimous verdict, your jury foreperson must
6 fill out the answer to the written questions on the
7 verdict form and sign and date it.

01:25:30

8 After you have concluded your service and I have
9 discharged the jury, you are not required to talk with
10 anyone about the case.

01:25:44

11 If you need to communicate with me during your
12 deliberations, the jury foreperson should write the
13 inquiry and give it to the court security officer. After
14 consulting with the attorneys, I will respond either in
15 writing or by meeting with you in the courtroom. Keep in
16 mind, however, that you must never disclose to anyone, not
17 even to me, your numerical division on any question.

01:26:07

18 It's now approximately 1:25, and I understand that you
19 are going to take your lunch break now. After you have
20 returned from lunch, you will return to the jury room and
21 begin your deliberations. At this time, you may --

01:26:28

22 Oh, one final point. The schedule is your own. We
23 have been going to 5:00 each day. If you in your
24 estimation determine that you want to go longer than 5:00
25 today because you think you are close and you can reach a

Jury Deliberation

1 verdict and you want to stay extra time, that's fine. I
2 and the lawyers will stay here and await your verdict.
3 But I do ask that you work at least until 5:00. If you
4 return tomorrow in the morning, I ask that you return no
5 later than 9:00 a.m. If you want to return earlier than
6 9:00 a.m., before you leave, so indicate; and we will make
7 arrangements to have the jury room open before 9:00 a.m.

01:26:48

8 At this time, you may step down and return to the jury
9 room to begin your break and/or deliberations.

01:27:07

10 All rise for the jury.

11 (Jury exited courtroom at 1:27 p.m.)

12 THE COURT: Counsel, as I was reading it, I
13 determined a couple of typos. I was writing those in. So
14 we're going to make those corrections before we send it
15 back, but they were just typos. They were not substantial
16 changes. You probably caught me as I was stopping and
17 making some of those corrections.

01:27:37

18 Counsel, your final task. I need the admitted copy of
19 Plaintiffs' Exhibit Numbers 4 and 5 and the admitted
20 exhibit of Plaintiffs' Exhibit Number 12, which I already
21 have up here. So I need Plaintiffs' Exhibit Numbers 4
22 and 5.

01:28:02

23 MR. COOK: Your Honor, Plaintiffs' Exhibit
24 Number 4 is four loose sheets. They are not, by nature,
25 stapled.

01:28:17

Jury Deliberation

1 THE COURT: I have a staple and a paperclip.
2 Which do you prefer?

3 MR. COOK: Either one. May I approach?

4 THE COURT: You may. It is up to you.

01:28:27

5 MR. COOK: Let's do paperclip because they were
6 -- they were kept separate in that way.

7 THE COURT: Counsel, if you'll approach.

8 MR. WALLACE: Yes, sir.

01:28:39

9 THE COURT: This is Plaintiffs' Exhibit Number 12
10 that will go back -- I'm sorry -- Defendant's Exhibit
11 Number 12 that will go back to the jury. That is
12 Plaintiffs' Exhibit Numbers 4 and 5 that will go back to
13 the jury.

01:28:53

14 MR. COOK: Plaintiffs have no additional
15 objection to Defendant's Exhibit Number 12.

16 THE COURT: Well, I just wanted to make sure.

17 MR. COOK: It is what it appears to be.

18 THE COURT: It is what it appears to be?

19 MR. COOK: Yeah.

01:28:59

20 THE COURT: Okay.

21 MR. WALLACE: And these are Exhibits 4 and 5 that
22 were submitted by the plaintiffs.

23 THE COURT: Very well. Thank you. Thank you,
24 Counsel.

01:29:07

25 Anything else from the plaintiffs before we recess as

Jury Deliberation

1 we await word from our jury?

2 MR. COOK: Your Honor, Mr. Berlanga is going to
3 remain. May I be excused?

4 THE COURT: You may be. You are excused.

01:29:21

5 MR. COOK: Thank you.

6 THE COURT: Anything else from the defense as we
7 await word from our jury?

8 MR. WALLACE: No, Your Honor.

01:29:28

9 THE COURT: We are in recess until such time as
10 we hear from our jury. I understand that they were going
11 to take their lunch break. I will have Ms. Edwards to
12 come back in and tell you about their return so that you
13 can also take your lunch break, but I understand they were
14 just going to walk over to the food trucks in front of
15 City Hall. We are in recess.

01:29:44

16 (Recess from 1:29 p.m. to 3:52 p.m.)

17 (Jury knocked with a note to the Court at 4:04 p.m.)

18 THE COURT: Thank you. Please be seated. We are
19 back on the record in Cause Number 4:17-CV-2171, Casey
20 Nelson, et al v. Texas Sugars, Inc., et al.

04:04:42

21 Counsel for the parties are present here in the
22 courtroom. The jury is not present in the courtroom. The
23 Court has received two questions from the jury.

24 Question 1: Can we have a written transcript of
25 witness testimonies?

04:05:02

1 The Court intends to respond to that question with:
2 If members of the jury have a dispute about specific
3 testimony, please identify that testimony and the Court
4 will attempt to locate it and provide it to you. It will
04:05:20 5 take some time to locate and transcribe the requested
6 testimony. You will not be provided with a full
7 transcript to reread just for the purpose of rereading
8 testimony.

9 Any objection to that response?

04:05:35 10 MR. BERLANGA: No objection from the plaintiffs,
11 Your Honor.

12 MR. KING: No objection from the defendant, Your
13 Honor.

14 THE COURT: Very well.

04:05:44 15 The second question: Can we get clarification on
16 Number 6, the intent of plaintiff?

17 The Court intends to respond to Question Number 2, as
18 follows: You have been provided all instructions on the
19 law and required definitions. Please read the
04:06:08 20 instructions with your best understanding.

21 Any objection to that response?

22 MR. BERLANGA: Your Honor, plaintiffs would
23 object only to the extent that I think the jury should be
24 informed that the intent -- subjective intent of the
04:06:22 25 parties is only relevant to the extent that it mirrors the

1 economic realities of the situation. And I believe that's
2 the statement from the Fifth Circuit in *Parrish* and cited
3 in our -- in both parties' briefs extensively.

04:06:38

4 MR. KING: Defendant does not have an objection
5 to what the Court intends to do.

6 THE COURT: Do you have any submission to a jury
7 with the proposed definition of "intent" under the pattern
8 jury charge as you have so explained to the Court?

04:06:55

9 MR. BERLANGA: I do not, Your Honor. As I
10 represented to the Court in its earlier question about the
11 pattern jury charge, whether it's been submitted to any
12 jury, I was unable to locate any case submitting an
13 independent contractor question to a jury in the Southern
14 District of Texas. So I don't have one, one way or the
15 other. I just haven't been able to find one.

04:07:11

16 THE COURT: Very well. So as to Pattern Jury
17 Charge 11.26, you could not find a case in which that
18 question had been submitted to a jury?

04:07:32

19 MR. BERLANGA: I looked, Your Honor. I could not
20 find one in the Southern District of Texas.

21 THE COURT: Okay. Did you find it anywhere else
22 in the Fifth Circuit?

04:07:42

23 MR. BERLANGA: I didn't have occasion to look
24 because I think the Court requested just the Southern
25 District.

Jury Deliberation

1 MR. KING: I believe -- I believe defendant cited
2 a case out of the Southern District of Texas where that
3 question 11.26 was referenced, but the docket entry for
4 the case was sealed.

04:08:00

5 THE COURT: Very well. I believe that right now
6 my response is appropriate to ask them to go back and
7 reread or to -- that they have been provided with
8 instructions and to please read the instructions with
9 their best understanding. If it turns out that there is
10 continuing confusion, we'll revisit possibly an additional
11 explanation.

04:08:17

12 MR. BERLANGA: Yes, Your Honor. And just
13 procedurally, I just wanted to make clear for the record
14 that we're not removing our objection to submission of the
15 intent element in the first place.

04:08:35

16 THE COURT: That's been submitted and ruled upon.

17 MR. BERLANGA: Thank you, Your Honor.

18 MR. KING: Your Honor, the case that I was
19 thinking about, the independent contractor question was
20 not submitted to the jury. However, it was considered in
21 the district court's analysis. And that is the *Gate Guard*
22 case.

04:08:46

23 THE COURT: Very well. So just to be clear, in
24 regards to the Court's proposed response to Jury Question
25 Number 2, the defense has no objection.

04:09:00

MR. BERLANGA: Correct, Your Honor.

THE CLERK: All rise.

(End of requested excerpt.)

COURT REPORTER'S CERTIFICATE

I, Laura Wells, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Laura Wells

Laura Wells, CRR, RMR

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